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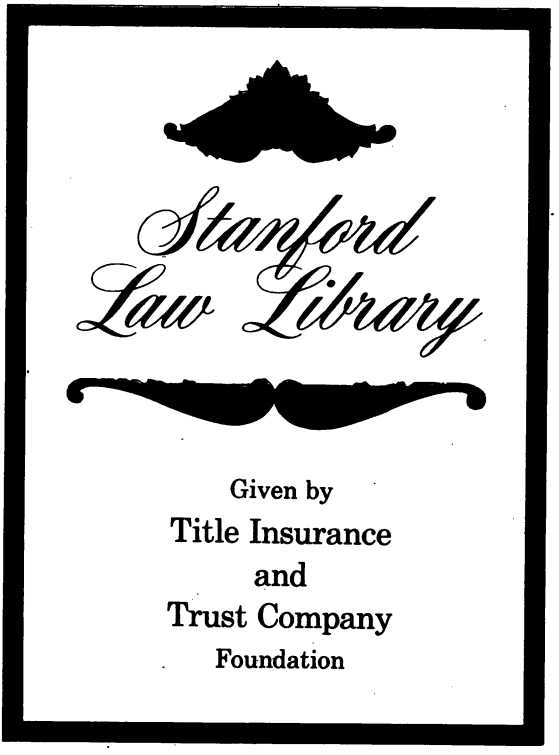
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W

A TREATISE

OF THE

Law

RELATIVE TO

THE RIGHTS OF LIEN

AND

STOPPAGE IN TRANSITU.

BY RICHARD WHITAKER, ESQ.
OF THE MIDDLE TEMPLE.

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PREFACE.

THE advantage which the profession has unquestionably derived from treatises in which the scattered principles and decisions concerning subjects of particular importance, and frequent occurrence in the law have been collected, and reduced to method, would of itself (while any such subject remains not thus rendered easy of reference and comprehension,) be a sufficient apology for undertaking a work dedicated to those purposes; and upon this ground alone an attempt to collect and methodize the law relative to the rights of *Lien* and *Stoppage in Transitu*, would be justifiable were there no other motive for making it. But a more satisfactory reason suggests itself; the laws of this

country have deemed it expedient, that private individuals should have the power of enforcing their rights by their own immediate acts, in certain cases, in which the means of doing it would be lost, if they were obliged to have recourse to the slower process of Courts of Justice. Where the individual is thus entrusted with the right of acting for himself, and where the occasion may require him to act with a promptitude which will not admit the precaution of resorting to legal advice, it becomes a matter of particular concern to him, to be thoroughly acquainted with the nature and extent of his right. Among the rights of this description there are none more frequently called into exercise than those of lien and stoppage in transitu, and none, it may therefore be presumed, which the convenience not only of the profession, but of the very numerous class of individuals engaged in this country in commercial pursuits, more urgently requires to be made the subject of a distinct treatise.

It is under these impressions, that I have endeavoured in the following pages to collect and

reduce to method the law relative to the rights of lien and stoppage in transitu ; rights which though they are in many points essentially distinct, bear so near a relation and resemblance to each other, that they may be very properly included in the same treatise.

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ERRATA.

Page 23, line 10, insert *be made* after *compensation.*
Page 24, line 5, from the bottom of the note, for *c.* 139, read *c.* 136.
Page 29, line 16, instead of *the faith for*, read *the faith of a.*
Page 78, line 1 of the notes for *will lie*, read *well lay.*
Page 89, last line of the note, for (*f*) read (*h*)
Page 90, last line of the text, place (*c*) before *is.*
Page 93, line 22, for *was*, read *being.*
Page 102, line 18, for *this*, read *their.*
Page 126, last line of note, after *III.* insert *P.* 32.
Page 144, line 10 of note, for *property*, read *bargain*, and for *bargain*, read *property.*
Page 158, last line but one of the text, insert *vendor to* after *a.*
Page 176, last line of the text, for (*e*) read (*d.*)
Page 177. line 8 of the text, for *cause*, read *possession*, and line 11 of the notes, for (*d*) read (*c*),
Page 194, line 8, for *consignor*, read *consignee.*
Page 196, line 7 of the notes, insert *it appears*, before *that.*
Page 227, line 14 of notes, for note* read *note* (*d*),

THE

LAW OF LIEN.

CHAP. I.

Nature, Origin, and different Species of Lien.

THE term Lien, as adopted by our courts of law and equity, and as used by our legal writers, differs in the extent of its acceptation. In that which is most extensive, it applies to every case in which either real or personal property is charged with the payment of any debt or duty: every such charge being denominated "a Lien on the property."

Definition of the term Lien, first in its most enlarged sense.

It is not my intention in this treatise to enter into the consideration of every sort of legal and equitable right, which this comprehensive definition of the term embraces. Were the whole law on the subject collected, it would not only occupy much more space than that which it is purposed to give to this treatise, but

would supply ample matter for more than one. The kinds of Lien to which the present will be confined, are those which are included under the term in its most limited signification, and in which it has been defined to be, "the right which one person in certain cases possesses of detaining property placed in his possession belonging to another, until some demand, which the former has, be satisfied." (*a*)

Secondly, in its most confined sense.

Nature of liens.

This right of lien or retainer being frequently advanced as a defence in actions of trover, and assumpsit at law, and in suits in equity, for the recovery of goods and money, has not improperly been assimilated to the right of set off: since these two rights are certainly so far analogous, that the effect of both is to prevent circuity of action, an inconvenience against which partial provision only was made by the common law in the allowance of the former right. For the only case in which

(*a*) Per Grose, J. Hammonds v. Barclay, 2 East 235, and see opinion of Buller, J. in Lickbarrow v. Mason, 6 East 25, in notis, in which he defines a lien to be a qualified right which in given cases may be exercised over the property of another. And see judgment of Lord Ellenborough, C.J. in Wilson v. Balfour, 2 Campb. 579, in which he observes, "a lien is a right to hold."

complete justice could be done at common law in the same suit, where the parties to it had mutual demands which did not constitute an account between them, was that in which an action was brought to recover some specific property, which the law considered as a pledge in the hands of the party from whom it was demanded; or, in other words, on which the party had a lien. In which case the owner was not allowed to recover the property without first discharging the debt for which it was a security. In other cases a cross demand could not be advanced as a defence, but the party was compelled to have recourse to a separate action. To remedy this hardship the right of set off was created by the legislature, at first indeed only in cases of bankruptcy, temporarily by 4 Ann. and subsequent statutes, and perpetually by 5 Geo. 2. c. 3. s. 28. by which it was enacted, that where mutual credit had been given, or mutual debts were due between the bankrupt and any other person before the bankruptcy, the account should be stated, and the balance only should be paid on either side. Afterwards, however, by 2 Geo. 2. c. 22. s. 13. and 8 Geo. 2. c. 24. s. 4. the right

of setting off was given in all cases where mutual debts were due in the same right.(*b*)

But though these rights of lien and set off frequently concur, and the benefit arising to the party from the exercise of them is sometimes the same; they are by no means exactly similar with respect to either their extent, or their effect in the cases to which they do extend.

With regard to their extent, a right of lien may be advanced as a defence in an action at law or proceeding in equity (*c*) for the recovery of specific goods or money. But the statutes for setting off *mutual debts* have been holden not to extend to goods, or other specific property, but only to *pecuniary* demands on one side and the other. (*d*) Because the possession of such specific property does not properly constitute a debt. (*e*)

(*b*) Green v. Farmer, 4 Burr. 2214.

(*c*) In cases of liens on, or pledges of, personal property, courts of equity will determine exactly as a court of law would decide if an action of trover was brought for the property. Jones v. Smith, 2 Ves. jun. 378. And whatever may be set off in equity, on the ground of lien, may likewise be set off in an action of trover. Lempriere v. Pasley, 2 T. R. 491. And see Downman v. Matthews, Prec. Cha. 580.

(*d*) Green v. Farmer, 4 Burr. 2218.

(*e*) Cullen, 209.

The statutes relative to mutual credit, however, have received a more liberal construction, and the courts, taking into consideration the hardship of a person, who has in his possession, as a security, goods on which he has a lien for part of his debt, being obliged to relinquish them, without previously having out of them all the satisfaction they can yield for the *whole* of his debt, have always inclined to consider such cases as within the clause of mutual credit, wherever the circumstances have afforded an opportunity of considering the transaction as a matter of account; or of implying, from the manner of dealing between the parties, an agreement, that the goods should be a security for the whole debt; and that the credit was given on that ground; though there were no direct evidence of a positive agreement for that purpose. (*f*)

(*f*) Exparte Deeze, 1 Atk. 228. Expte Ockenden, 1 Atk. 235. There is another point in which the rights of set off and lien differ in their extent. A lien may be acquired for a demand against which the statute of limitations has run; for the operation of that statute discharges only the remedy by action, and does not annul the debt; and therefore it has been determined that if a creditor obtain possession of goods on which he has a lien for a general balance, he may

The difference between the several rights of lien and set off, in point of extent, being thus noticed, their different effects, in the cases to which they extend, is to be next considered. In cases of *lien*, the property on which it exists, being considered as a pledge, may be detained, though it be of greater value than the debt on account of which it is withholden, until the whole of that debt is discharged. But in cases of *set off*, under 2 Geo. 2. c. 22. s. 13, and 8 Geo. 2. c. 24. s. 4. though the debt due to the defendant be larger than that he owes to the plaintiff, he can only set off as much of it as is equal to the sum for which he is sued, and is driven to a separate action for the recovery of the rest. On the other hand, in the case of *lien*, the property on which it is claimed cannot be retained after the debts, for which that property is considered a security, are paid; though other debts be still owing from the owner.

hold them by virtue of his lien, though that general balance consists of debts barred by the statute. Spears v. Hartley, 3 Esp. R. 81. But such debts cannot be set off, and if they be pleaded in bar to the action, the plaintiff may reply the statute of limitations. Remington v. Stevens, Str. 1271. Or if given in evidence on a notice of set off may be objected to at the trial. Bul. N. P. 180.

But in cases of set off all mutual debts due in the same right may be set off by the defendant to the amount of the debt for which he is sued. So that, although entire satisfaction to the claims of both parties may, under some circumstances, it cannot always be obtained in the same suit, either by the exercise of the right of lien, or of that of setting off mutual debts under 2 Geo. 2. c. 22. s. 13. and 8 Geo. 2. c. 24. s. 4. But the statute relating to mutual credit admits of complete justice being done to both parties in the same suit, in every case to which it extends. For it provides, that the account shall be stated, and the balance paid, on whichever side it may be due, whether to the plaintiff or the defendant.*

Different species and origin of liens.

Having stated thus much on the general nature of the right of lien, it will now be proper to explain the modes in which it may arise, and the different species into which it is divided. Liens either exist by common law, or are created by usage, (g)

* The accounts may be balanced in an action at law as well as before the commissioners or assignees. 2 Atk. 49.

(g) But it can be created, it seems, by the usage of trade only, and where goods have been deposited in the nature of a pledge. 6 T. R. 263. Accordingly

or by express agreement; (*h*) and they are by the law distinguished into two species, namely, particular liens, and general liens: a particular lien is a right to retain the property of another on account of labour employed, or money expended on that

where a carpenter, who had worked for some time in the Queen's yards, declined working there any longer, and the surveyor refused to let him take away his tools, giving in evidence, in an action of trover which was in consequence brought against him, an usage for the surveyors of the Queen's yards to detain the tools of workmen in order to compel them to continue working until the Queen's work should be finished. It was holden that the action lay; and no regard was paid by Holt, C. J. before whom the cause was tried, to the usage insisted upon by way of defence. Baldwin v. Cole, 6 Mod. 212. Bac. Ab. tit. Trover. Both the existence [1] and the extent of liens by usage are matters of evidence. But where such liens have been very frequently proved to exist, it seems that the courts will consider their existence as settled law, and will not allow it to be afterwards disputed. Naylor v. Mangles, 1 Esp. 109. Spears v. Hartley, 3 Esp. 81. The mere opinion of witnesses is, however, no evidence to prove such usage. Syeds v. Hay, 4 T. R. 260.

(*h*) Ex parte Deeze, 1 Atk. 229. Ex parte Ockenden, 1 Atk. 236. Green v. Farmer, 4 Burr. 2221, per Grose, J. Kirkman v. Shawcross, 6 T. R. 14. Naylor v. Mangles, 1 Esp. 109.

[1] 1 Atk. 228, 235. Prec. Cha. 580. 1 Esp. 109. Oppenheim v. Russell, 2 Bos. & Pul. 42.

same property. A general lien is a right to retain the property of another on account of a general balance due from the owner. (*i*)

The doctrine of liens having taken its rise upon principles of natural equity and commercial necessity, in the earliest period of its existence, we find only the first species, that of particular liens, allowed without an express contract; and even that seems to have been admitted only in cases where the justice or necessity of the case peremptorily demanded its allowance; as where the party was obliged by law to receive the goods (*k*) in respect of which he claimed the lien, or where he had, at his own peril, labour, or expence, saved them from loss or destruction *at sea*; where the owner had abandoned, or was no longer able to protect them. (*l*)

This right, however, which seems to have been first introduced merely on principles of justice and necessity, was afterwards extended to a far greater length, upon those of policy and convenience as well as of justice; and not only were particular liens admitted in many more in-

(*i*) Per Heath, J. 3 Bos. and Bull. 494.
(*k*) See post. Chap. II.
(*l*) Hartford v. Jones, Ld. Raym. 393.

stances than those already mentioned, (*m*) but general liens were allowed to be claimed, by implication, from the general usage of trade, or the mode of dealing between the parties, and without any express contract for that purpose. And thus, to the two modes in which liens might before subsist, namely, by common law, and by express contract, was added a third, by usage; from whence is implied an agreement by which the goods are pledged for the payment of the debt. (*n*)

This bias in favour of liens appears to have continued for a long period. (*o*) But of late years, it has taken a different turn, and the courts seem to have thought that the doctrine has been carried full as far as true policy would warrant, and have therefore most strongly inclined against its further extension. (*p*) Yet it should be remark-

(*m*) Post. Chap. II.

(*n*) Post. Chap. III. The distinctions between liens by express contract, and liens from the nature of dealing, occurs first in Exparte Deeze, 1 Atk. 228. A. D. 1748. Montagu B. L. 237.

(*o*) Green v. Farmer, 4 Burr. 2221. Wilkins v. Carmicael, Doug. 97. Kirkman v. Shawcross, 6 T. R. 14. Judgment of Chambre, J. in Richardson v. Goss, 3 Bos. and Pul. 126.

(*p*) Rushforth v. Hadfield, 7 East, 229. The courts will not now originate a lien where none has before been allowed to exist, Hussey v. Christie, 9 East. 426.

ed, that whatever difference of opinion may at different periods have been manifested with respect to the extension of liens, in general, a wide distinction has generally (*q*) been observed, between particular and general liens. The former have been regarded with a more favourable eye, as founded on the common law, and the general principles of justice: while the latter have been looked upon with jealousy, being considered as encroachments on that law, and as founded solely in the usage, and permitted only for the benefit of trade. (*r*)

Having given this brief explanation of the nature, origin, and different species of lien, according to the most confined sense of that term, I will now state the arrange-

(*q*) In Kirkman v. Shawcross, 6 T. R. 14. the court considered a *general* lien as a right favoured by natural justice.

(*r*) Oppenheim v. Russell, 3 Bos. and Pul. 42. Houghton v. Matthews, 3 Bos. and Pul. 494. In the judgment of Rooke, J. Richardson v. Goss, 3 Bos. and Pul. 126. he says, "I think the doctrine of general liens is not to be favoured, because all persons who claim under them must have been guilty of neglect in suffering goods, upon which the law has given them a special lien, to go out of their hands, without indemnifying themselves by setting up a claim to a general lien."

ment which I purpose to observe in the portion of this treatise which is dedicated to the consideration of liens. My intention is, first, to lay before the reader the general rules of law, with regard to particular and general liens, under three heads of enquiry: namely, first, in what cases these rights may be acquired? 2dly, In what cases they cannot? 3dly, By what means they may be divested? And, then, to consider under distinct heads the lien of each particular character to which the law has specifically decided that right to belong. The inquiry as to the cases in which the right of a particular lien may be acquired, will form the subject of the next chapter.

CHAP. II.

In what Cases a particular Lien may be acquired;

1st, By the Common Law;

2dly, By express Contract;

3dly, By a Delivery through Persons to whom the Property on which the Lien is claimed, does not belong; as Servants, &c.

PARTICULAR liens exist either, 1st, by the common law; or 2dly, by express contract. The cases in which a particular lien may exist by the common law, are divisible into two classes. 1st, Where a particular lien is claimable by persons who come under the denomination of bailees. 2dly, Where it is claimable by persons who do not fall within that denomination. With respect to the first of these classes, a notion seems to have been entertained, that a particular lien was the common right of all bailees for reward: and that where a debt accrued from the bailor to the bailee in consequence of the bailment, the latter might detain the thing bailed, until the debt was discharged, without any special agreement

By the common law,

By bailees.

to that effect. (*a*) But however consonant to equity or policy this might appear at first sight, as an universal rule, the application of it to many cases would certainly be attended with great inconvenience, as well as injustice; and upon this ground, we find exceptions have been made to it in more than one instance. Thus in the case of Chapman *v.* Allen, Cro. Car. 271, it was determined that a person who took cattle to agist could not detain, them, against the person to whom the owner had sold them, for the value of their agistment. And it was laid down by Lord Holt, in the case of York *v.* Greenaugh, Ld. Raym. 866, and decided by Lord Kenyon, in the case of Hunter *v.* Berkeley, Esp. Ni. Pri. 583, that a livery stable-keeper has no lien on the horses standing at livery in his stable for the price of their stabling and food.

Another rule, less extensive than the preceding, with regard to the cases in which a particular lien may be claimed by bailees, has been expressly laid down in the case ex parte Deeze, 1 Atk. 228; and appears to have been taken for granted in

(*a*) See Christian's Notes, 2 Bla. Com. 453.

other cases; (*b*) namely, that wherever goods are delivered to a tradesman for the execution of the purposes of his trade upon them, he has a particular lien on them. A third rule, however, still less extensive, but more certain than either of the preceding, is that mentioned in the first chapter; namely, that where the party is from the nature of his occupation under a legal obligation to receive, and be at trouble or expence about the personal property of another, in every such case he is entitled to a particular lien on it: for there are certain trades and occupations, the public exercise of which the common law has considered indispensably necessary to the general convenience of the community; and has therefore obliged all persons who undertake to carry on such trades, to accept, as far as their means will admit, employment from every individual

(*b*) See ex parte Ockendon, 1 Atk. 236, and Houlditch v. Milne, 3 Esp. 86; where a coachmaker was allowed to have a particular lien, to which he could not be entitled by the common law, unless all trades have that lien by the common law; because the trade of a coachmaker was not introduced into this country until after the reign of Queen Elizabeth. But see 7 East. 229. Lord Ellenborough, however, appears there to be speaking only of general liens.

who offers it with a reasonable reward. And in recompence for the burden which it has thus imposed, the same law has allowed the tradesman a particular lien upon the thing delivered to him in the course of his business for the labour or expence he is obliged to employ upon it. (*c*) On this ground, common carriers, (*d*) innkeepers, (*e*) and farriers, (*f*) have a particular lien by the common law. To what other trades the obligation of accepting employment from all persons indiscriminately extends, does not appear to have been ever precisely determined. The rule laid down by Lord Holt, in Lane v. Cotton, 12 Mod. 484, Ld. Raym. 646, S.C. is, that wherever any subject takes upon himself

(*c*) It was said by Ryder, C. J. delivering the opinion of the court in Brennant v. Current, T. 28 & 29 Geo. 2. B.R. MSS. cited Selw. N. P. 1286, that he had not found it laid down as a general rule, that the remedy by retainer was co-extensive with the obligation to receive goods. But see Nayler v. Mangles, 1 Esp. R. 109.

(*d*) Yorke v. Grenaugh, Ld. Raymond, 867; Kirkman v. Shawcross, 6 T. R. 17; Oppenheim v. Russel, 3 Bos. & Pul. 42.

(*e*) Cases cited in note (*d*,) and Naylor v. Mangles, 1 Esp. 109.

(*f*) See Bac. Ab. tit. Trover, and post Lien of farrier.

a public employment for the benefit of his fellow subjects, he is *eo ipso* bound to serve the subject in all things that are within the reach and comprehension of that employment. It has however been determined that a carpenter is under no such obligation. And though the last of the three rules which have been stated in this chapter, with regard to the particular lien of bailees, (namely, that wherever a party is compellable by law to receive goods, he is by the same law entitled to a lien upon them,) appears to be the most certain; the second, that a particular lien is the common right of all trades, may be correct, (*g*)

(*g*) As this rule, however, may appear rather vague and uncertain, wherever it has been expressly decided that any particular trade is entitled to this sort of lien, by the common law, it will be specified under the head of that trade. And as there are some other cases besides those mentioned in the text, in which it has been expressly decided that no particular lien, and some in which (though there is no express decision concerning them) from dicta and observations of the judges it remains uncertain whether any particular lien exists, and any of which it would be improper to pass over without notice; I shall here specify them: they consist in certain cases of lien on ships. For though both by the civil laws of the Roman empire, and the maritime laws of Europe, (1) the principles of which have al-

(1) Dom. Civil Law, B. 3. tit. 1. s. 5. Abbot on Ship. 133, 4.

as there does not appear to be any determination expressly against it, and as it may

ways in great measure governed the proceedings of our courts of admiralty, (2) every person who has incurred expence, or employed labour, in fitting out, supplying or repairing; and by the latter description of laws, every person who has earned wages in navigating (3) a ship, is allowed a lien or specific remedy in *rem*, for his remuneration, (4) though no instrument or express agreement be made for that purpose. In this country it is only in particular cases that the common law permits that lien to be carried into effect by process in the court of Admiralty, and these are where the demand arises for repairs done or necessaries supplied in a foreign port, (5) or for the wages of

(2) 3 Bla. Com. 69.

(3) Abbot, 458.

(4) Abbot, 134.

(5) Where the necessaries are furnished, or the repairs done during the course of the voyage at sea, or in a foreign port, the captain or master is not only at liberty to give the person furnishing such necessaries or doing such repairs, a lien upon the ship, 3 Mod. 244. 1 Ld. Raym. 152. 2 Ld. Raym. 982. 3 T. R. 267. or freight, Abbot, 144. by an express hypothecation; but in every contract made under such circumstances the maritime law will imply an hypothecation, 2 Ld. Raym. 805.; and the vessel may be proceeded against in the court of Admiralty without any danger of a prohibition from the courts of common law. But though the master or captain of a ship may give others a specific remedy against the ship itself by employing them to furnish it with necessaries or repairs in the course of the voyage, he cannot acquire a lien on the ship

be collected from several decisions that the right of retainer by the common law,

seamen and officers beneath the rank of a captain or master; though the contract for such wages be made on land, provided it be in the usual terms, and not by writing under seal. But the captain who has a demand for wages, (6) and the tradesmen who have demands for necessaries furnished, or repairs done to the ship (7) in this country, are confined to their remedy at common law. And there do not appear to be any cases in which it is expressly decided that a right of lien exists on a ship by the common law except the case of salvage. For though in the case of

himself for any advances he may make for the owners, or for any repairs done at his expence *abroad*, though they be absolutely necessary to the preservation of the ship. Hussey v. Christie, 9 East 426. 13 Ves. jun. 484. And it seems he has no lien for necessaries or repairs done *at home* at his expence. Doug. 979. East 493. But if he pays for such repairs after the bankruptcy of the owners, and demand made by the assignees, and after possession of the ship has been relinquished both by himself and the party furnishing the repairs or necessaries, he certainly has no lien. Doug. 97.

(6) The indulgence which the law allows to all the mariners and officers below the rank of captain or master, of proceeding against the ship itself for their wages, in the court of Admiralty, is refused to the captain or master, upon the ground that he contracts individually with the owners, and trusts to their personal credit, and not to that of the ship. 1 Ld. Raym. 576, 632. Doug. 101. and see 2 Peere Wms. 367. contra.

(7) Abbot, 134.

is not now confined to those trades, in which there is an obligation to receive

Rich v. Coe, Cowp. 636. Lord Mansfield, in delivering the judgment of the court, lays it down that whoever supplies a ship with necessaries has a treble security: 1st, the person of the master; 2d, the *specific ship;* and 3d, the personal security of the owners: and though in Farmer v. Davies, 1 T. R. 109. his lordship repeats the same doctrine; these two dicta of Lord Mansfield are not only unsupported as far as I can discover by any other decision in dictum, except that of Lord Kenyon in White v. Baring, 4 Esp. R. 22. at nisi prius (and in which case a new trial was granted, on the ground of a mistake of the judge in point of law, but never had the cause been settled.) But the correctness of them is doubted by Lord Kenyon himself, in Westerdell v. Dale, 7 T. R. 312. and they are contradicted by the tenor of almost all the other decisions upon this subject. Mr. Abbot, however, in his excellent Treatise on the Law relative to Merchant Ships and Seamen, though he does not allow the doctrine of Lord Mansfield in the cases of Rich v. Coe, and Farmer v. Davies, to be law, to the full extent it is there laid down, nor admit that the law of England has adopted the rule of the civil law with regard to repairs and necessaries furnished here in England; yet seems to think, that a lien may exist on a ship, at least in one instance, by the common law. See part 2. chap. III. sect. 9. page 135. where it is said, " *a shipwright indeed who has taken a ship into his own possession to repair it, may not be bound to part with possession, until he is paid for the repairs, any more than a taylor or smith, or any other artificer, in regard to the object of his particular*

the goods; though the right was most probably originally founded upon that

trade. But a shipwright who has once parted with possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries, are not by the law of England preferred to other creditors, nor have any particular lien upon the ship itself, for the recovery of their demands." Mr. Abbot has not supplied us with any authorities in support of the opinion expressed in the former part of the passage here cited; nor can any, I believe, be adduced which directly confirm it. But from the reason given by Lord Chancellor Hardwicke, in ex parte Shank, 1 Atk. 234. why the shipwright in that case had no lien on the ship for repairs, namely, because he had parted with possession; it may be implied that his lordship was of opinion, that where the shipwright had not parted with possession, he might claim a lien. And if the rule laid down by the same Lord Chancellor, in the preceding case, ex parte Deeze, that all tradesmen have a particular lien on goods for work done to them in the course of their respective trades, be correct, a shipwright certainly has a lien upon a ship for repairs done to it in this country. But this rule, it is to be observed, does not appear very certain; and in Wilkins v. Carmichael, Doug. 97. Lord Mansfield himself seems to doubt the existence of the carpenter's lien for repairs done to the ship. It may seem also inconsistent with commercial policy, that the detention of a whole ship should be allowed for a debt perhaps comparatively trifling. The same argument, however, does not apply against a ship builder's having a lien on the ship while it remains in his possession, for the price of building it; to which he must be intitled in com-

obligation. For dyers have certainly the option of receiving or refusing goods from any one who may send them for the purpose of being dyed; and yet it seems to be admitted, in the cases of Kirkman v. Shawcross, 6 T. R. 14. and Close v. Waterhouse, cited 6 East, 523. note (*e*), that they have a particular lien on all goods they do receive for that purpose. Nor does there appear to be any case in which it is decided, that taylors are bound to accept employment from any one that offers it; but whether they are or are not under such an obligation, it is clear that they have a particular lien by the common law upon the cloth placed in their hands for the execution of the purposes of their trade.

By persons not bailees.

2dly. We are to enquire in what cases a particular lien may be claimed by persons who do not come under the denomination of bailees; and a twofold division may likewise be made of this part of the subject; 1st, Where the goods come into the possession of the party by finding, and he has been at some trouble or expence about them. And, 2d, Where the goods have been taken possession of under some

mon with other vendors of goods. See post. Lien of Vendor, and Daniel v. Russell, 13 Ves. jun. 393.

legal right, and expence necessarily incurred for their preservation.

As to the first division, wherever any one has, at his own labour, risque, or expence, preserved the property of another from loss *at sea*, when the owner, or those entrusted with the care of it, had abandoned, or were no longer able to protect it, he is entitled by the common law to retain the property saved, till a just compensation made to him for the trouble, peril or expence, he may have incurred. (*h*) The principles

Where the goods come into the possession of the party claiming the lien by finding.

(*h*) Hartford v. Jones, 1 Ld. Raym. 393. Abbot on Ship, 383; and see Hamilton v. Davis, 5 Burr. 2732. Baring v. Day, 8 East. 57. This right of lien for salvage appears to have been also recognized by the statutes which have at different periods been passed respecting wrecks and salvage. The 27 Ed. 3. stat. 2. c. 13. provides, that goods cast away, and not coming under the denomination of wrecks, shall be delivered up by the salvers to the owner; *the latter paying the former a proper compensation for their trouble.* But the most important provisions with relation to this subject are, 12 Ann. stat. 2. c. 18. 26 Geo. 2. c. 19. s. 5. 48 Geo. 3. c. 130. s. 21. and 49 Geo. 3. c. 122. s. 32. for wherever the assistance is given, and the salvage effected, in consequence of an application by the master or chief officer to any of the public officers appointed by these statutes for the purpose of affording such assistance, the salvors acting under such officers cannot claim any lien or right of detaining the property by the common law, but must resort to the remedy

upon which this privilege is allowed, are those of public policy, and commercial necessity; but it is confined to cases in which the property is saved from loss *at sea:* for if every man who finds the property of another, which happens to have been lost or mislaid, and voluntarily puts himself to

afforded by those statutes on such occasions. And whenever an adjustment of the salvage has been made according to the provisions of those statutes, and the sum awarded tendered, no lien can be claimed for any further salvage. The 12 Ann. stat. 2. c. 18. it should be observed, extended only to cases where the services of the salvor are compelled by virtue of its provisions through the medium of the public officers therein named; and in the case of Baring v. Day, 8 East. 57. where the application for assistance was made by the commanding officer of the stranded vessel, not to the custom-house officer, but to a stranger, and the salvage was effected by his means, under the inspection, indeed, of two officers of the customs, but without their taking any part in it, except so far as was necessary to secure the duties due to the crown; it was decided to be a case not within the intent of the statute. And the 26 Geo. 3. c. 19. s. 5. applies only to the cases of *voluntary* salvors, to which it extends the regulations of the 12 Ann. st. 2. c. 18, as to the mode of adjusting and recovering the quantum of salvage. But by 48 Geo. 3. c. 139. s. 21. and by 49 Geo. 3. c. 122. s. 32. the same regulations are extended to the cases of persons acting under the authority of the owners and commanders of the ships saved; and further provisions are made with respect to the mode of adjusting the salvage.

some trouble or expence to preserve the thing, and to find out the owner, were to have a lien upon it for the casual, fluctuating, and uncertain amount, which he might reasonably deserve to have, great inconvenience would ensue. The owners of some kinds of property would have not only the common accidents from the carelessness of their servants to guard against, but also the wilful attempts of ill-designing people to turn such property loose, in order that they might be paid for the finding it. And even where the property had been really lost, the owners in seeking to recover it from the finder in an action of trover, would be placed in a very aukward situation, if they were obliged at their peril to make a tender of a sufficient recompence, before they brought the action; for such owners must always pay too much, because they can have no means of knowing exactly how much will be considered sufficient. And though there are cases, in which it is necessary that the owner of the property should submit to this inconvenience, it is more fit, in general, that he who claims the reward, should take upon himself the burden of proving the nature of the service he has performed, and the quantum of the recompence which he demands; instead of

throwing it upon the owner to estimate it for him, at the hazard of being nonsuited in an action of trover. For these reasons in every case (excepting that of the salvage of goods at sea) in which the finder of property lost has claimed a lien upon it for the expence or trouble he has voluntarily incurred about it, the claim has been disallowed, and the owner has recovered without satisfying it. (*i*)

Where the goods are taken possession of under some legal right.

2dly. With respect to the second division of this head; where the goods have been taken possession of under some legal right, and expence necessarily incurred for their preservation; only two cases appear to have occurred which may be properly classed under it. These are where the lord of a manor seized a beast as an estray, and was at the expence of keeping it for some time after he had proclaimed it; and the owner, within a year and a day after the proclamation, came and demanded it, and upon the lord refusing to deliver it, brought trover, without having first tendered a satisfaction for the keeping of it, (*k*)

(*i*) Nicholson v. Chapman, 2 H. Bla. 254. Binstead v. Buck, 2 Bla. R. 1117.

(*k*) Taylor v. James, 2 Rol. Ab. 92. (m.) pl. 3. Bac. Ab. Trover. Bul. N. P. 45. S. C. But according to

for want of which it was holden that the action would not lie. And where an horse was distrained, to compel an appearance in an hundred court; and it was determined, that, after appearance, the plaintiff could not justify detaining the horse until his keep was paid for. (*l*)

2dly. As to the cases in which a particular lien may exist by express contract. This right may be created in any case, where the parties chuse expressly to stipulate for it, (*m*) which is generally, either where goods are placed in the hands of a person for the execution of some particular purpose upon them, with an express contract that they shall be considered as a pledge for the labour or expence the execution of that purpose may occasion; or where property is merely pawned or delivered for bare custody to another for the

By express contract.

the decision of Henley v. Welch, Salk. 686. 11 Mod. 89. S.C. unless the lord makes a demand of certain amends, a general tender of amends will be sufficient. A distinction being there made between the case of an owner of an estray, and that of an owner of cattle damage feasant, the latter being considered a wrong-doer, and the former not so.

(*l*) Lenton v. Cook, H. 9 Geo. 2. Bul. N. P. 45.

(*m*) Chapman v. Allen, Cro. Car. 271. And see Kirkman v. Shawcross, 6 T. R. 14.

sole purpose of being a security for a loan made to the owner on the credit of it.

Through persons to whom the property does not belong, as servants, &c.

3dly. Are to be considered the cases in which a particular lien may be acquired through persons to whom the property on which it is claimed does not belong, as servants, &c. Particular liens may be derived through the acts of servants or agents acting within the scope of their employments. As, if a servant deliver cloth to a taylor to make his master's liveries; the taylor will have a lien upon the cloth for the value of the work done upon it. (*n*) And wherever a person, who delivers property which does not belong to him to another for the execution of the purposes of the other's trade upon it, is invested by the owner with the right or authority to dispose of the property in that way, the person to whom it is delivered shall not be defeated of the particular lien which the common law allows him for the trouble or expence he may have incurred about that property, by the owner's coming forward and claiming it. (*o*) Where, too, a person

(*n*) Per Lord Ellenborough, delivering the opinion of the court, in Hussey v. Christie, 9 East. 433.

(*o*) Richardson v. Goss, 3 Bos. & Pul. 119. Pultney v. Keymer, 3 Esp. 182. D. Grose, J. delivering the

in whose hands the property of another is placed for the execution of the purposes of his trade upon it, by an agent who has a power from the owner of disposing of it for those purposes, but none of raising money upon the credit of it, advances money or gives acceptance on the credit of that property to the agent, *and is ignorant, at the time of the receipt of it, that the latter is not the real owner;* he may retain it against the real owner, until he is paid the money so advanced, or indemnified against the liability to which he has so subjected himself. (*p*)

And if a person advances money, or gives acceptances upon the faith of a consignment of goods to him for the execution of the purposes of his trade upon them; but before the goods arrive in his hands, the property in them is transferred from the consignor to a third person, who is not able to countermand them before they come into the possession of the consignee, it seems that the latter may retain them against such third person, for any sum he may have advanced, or for which he may

judgment of the court, in Hammond v. Barclay, 2 East. 227; and see post, Lien of Insurance Broker, note.

(*p*) Ante, note (*o*).

have made himself liable upon the credit of them, as well as for the expence or trouble he may have incurred in the execution of the purposes of his trade upon them. (*q*)

(*q*) Richardson v. Goss, 3 Bos. & Pul. 119.

CHAP. III.

In what Cases a general Lien may be acquired.

1st, *By the general Usage of Trade.*
2d, *By the particular Usage of the Parties.*
3d, *By express Agreement.*
4th, *Through Persons to whom the Property on which the Lien is claimed, does not belong, as servants, &c.*

THE right to a general lien can exist only by the general usage of trade, by the particular usage of the parties, or by express agreement. 1st, With respect to the cases in which a general lien may be acquired by the general usage of trade: that usage is presumed to have been founded on contracts repeated so frequently, and so notorious, that every body must be considered as bound to take notice of it. (a) And it is clear, that an usage of any trade, for the persons who carry it on, to have a lien for their general balance, so general, uniform, and frequent, as to warrant an inference, that the party, against whom the right is claimed, had knowledge of it, and con-

By the general usage of trade.

(a) Per Rooke, J. Oppenheim v. Russel, 3 Bos. and Pul. 50.

tracted with reference to it, will be sufficient to establish such a lien. (*a*) But as general liens are considered contrary to the policy of the common law, and to public convenience, and an infringement upon the system of the bankrupt laws, (the object of which is, to distribute the debtor's estate proportionally amongst all the creditors :) to establish a claim to such a lien upon the ground of the general usage of *any* trade, strong evidence would be required of the frequency and notoriety of the usage. And in cases where the party

(*a*) It seems, that the lien for a general balance, which the usage of certain trades entitles those who exercise them to claim, is generally confined to such general balance as arises from work done in the course of those trades; and does not extend to money lent, as any collateral matter. But from the case, exparte Deeze, 1 Atk. 228. where the general balance of a packer was allowed to extend to money lent upon a note, on evidence that it was usual for packers to lend money to clothiers, and for the cloths to be a pledge not only for the packing work done, but for the loan of money. It may appear, that a lien for a general balance, not arising from work done or expence incurred in the course of the trade, but from matters foreign to it, might be established by usage. It should, however, be observed, that a packer is considered to be in the nature of a factor; Green v. Farmer, 1 Bla. Rep. 651. and that it is a part of a factor's business to advance money to his employers.

claiming the lien is, from the nature of his trade, under a legal obligation to accept employment from any one who offers it, and for that reason, has a right to a particular lien upon property entrusted to him in the course of his trade; the evidence of any usage for the extension of that lien to a lien for his general balance, ought to be proved by still stronger evidence than is necessary in cases where no such obligation exists. For in the latter cases, though the introduction of general liens may be against the public convenience, and contrary to the spirit of the bankrupt laws; it does not directly infringe upon the common law-right of the subject. But in the former, the tradesman alters his situation, by encroaching upon the right which every subject possesses, of compelling him to receive goods for the purposes of his trade, without annexing any condition for a general lien, and which right the subject cannot be presumed to have given up but upon very strong evidence. (*c*) Accordingly, where a common carrier attempted to set up a lien for his general balance, upon proof of one instance of the exercise of the right by a person engaged in the

(*c*) Kirkman v. Shawcross, 6 T. R. 14; Oppenheim v. Russel, 3 Bos. and Pul. 42.

same trade, so far back as thirty years, accompanied by many other instances, but which were either attended by circumstances which might have rendered it not worth the parties while, against whom they were exercised, to dispute the claim, or had taken place within a recent period, and were not brought home to the knowledge of the person against whom the lien, in the present instance, was claimed. The jury having negatived the usage upon this evidence, the court refused to grant a new trial. (*d*)

But when a general lien has been frequently proved, and allowed to exist by the usage of any particular trade, the courts will not permit the right to be afterwards disputed. (*e*) It is therefore, now unquestionable, that factors, packers, wharfingers, calico printers, and in one place, fullers, have, by the custom of their respective trades, a lien upon the property of their employers entrusted to them in the course of their trade, not only for debts arising in the execution of the purpose for which the property was delivered, but for any general balance due

(*d*) Rushforth v. Hadfield, 6 East. 519. 7 East. 224.

(*e*) Naylor v. Mangles, 1 Esp. R. 109. Spears v. Hartley, 3 Esp. R. 81.

from their employers in the course of their trade. It is likewise clearly established, that insurance brokers have a lien upon all policies, and bankers upon all paper securities, and attornies upon all papers in their possession belonging to their employers, for the general balance of their accounts. (*f*)

On the other hand, it is clearly settled, that millers and dyers (*g*) have no lien for their general balance by the customs of their respective trades. But it has not yet been generally found (though in one particular instance it was so determined) that carriers have no such lien. (*h*)

2dly, With respect to the cases in which a general lien may be claimed by the particular usage of the parties. It is open to any person to establish his claim to a lien for his general balance, upon the ground of particular usage, or previous mode of dealing between him and the party from whom he claims it. And proof of their having before dealt upon the footing of such a lien will be presumptive evidence, that they continued to deal upon the same

By the particular usage of the parties.

(*f*) See post, the liens of those several characters.

(*g*) See post, liens of millers and dyers.

(*h*) Judgment of Lawrence, J. Rushforth v. Hadfield, 7 East. 230.

terms.'(*i*) The circumstance of a person's procuring a loan from another who is already in possession of some of the former's property, as a security for a prior loan, seems to be evidence that the parties intended that the property should be a pledge for the whole debt. (*k*)

By express agreement.

3dly. As to the cases in which a general lien may be acquired by express agreement. Any person, whatever may be the description of the trade or occupation he exercises, may acquire a lien for his general balance, by an agreement which has the express assent of the customer from whom he claims it. And if a number of tradesmen, *not compellable by law to receive goods for the purposes of their trade*, enter into an agreement among themselves not to receive any goods to be manufactured in the course of their trade, unless upon condition that they shall have a lien upon such goods, not only for the debts accruing from the work performed upon those particular goods, but also for any general balance which may be due to them for work of the same kind performed upon

(*i*) Downman v. Matthews, Prec. Cha. 580. cited ex-parte Ockenden, 1 Atk. 235. Per Grose, J. Kirkman v. Shawcross, 6 T. R. 19.

(*k*) Demainbray v. Metcalf, 2 Vern. 691, 698.

other goods, which have been already delivered out of their possession, such agreement is good in law, and obligatory upon any person who, after notice of it, delivers goods to either of these tradesmen for the execution of the purposes of his trade upon them. (*l*)

So likewise any individual who exercises a trade, *in which he has the option of either accepting or refusing employment from any one who offers it*, may by publishing an express declaration that he will not receive any property for the purposes of his trade, but upon condition that he shall have a lien upon it for the general balance of his account, acquire a right to such lien against any employer, whom he can prove to have had previous notice of that declaration. (*m*)

But in cases where the tradesman is from the nature of his trade under an obligation to accept employment at all events, he cannot, *it seems*, impose a condition that he shall have a lien for his general balance upon his customers by declarations or notices of this nature, or acquire

(*l*) Kirkman v. Shawcross, 6 T.R. 14. and see Oppenheim v. Russel, 3 Bos. and Pul. 42.

(*m*) See judgments of Ld. Kenyon, Ch. J. and Lawrence, J. Kirkman v. Shawcross, 6 T. R. 14.

that right by any agreement which has not the *express* assent of the party against whom he claims it. And therefore it appears, that neither common carriers, inn-keepers or farriers, can claim a lien for their general balances in consequence of notices given by hem, they will not receive goods without a general lien. (*n*)

Through persons to whom the property does not belong, as servants, &c.

4thly. It remains to be inquired, in what cases a general lien may be acquired through persons to whom the property on which it is claimed, does not belong; and it is clear, that general as well as particular liens may be acquired on property by the receipt of it from servants or agents of the owner, acting within the scope of their employments. (*o*)

(*n*) See cases cited note (*l*).

(*o*) See post. lien of insurance broker, cases collected in notis.

CHAP. IV.

In what cases Liens cannot be acquired.

1*st*, *In what cases no general Lien can be acquired, though a particular Lien may exist.*
2*d*, *In what cases no sort of Lien can be acquired.*

In what cases no general Lien can be acquired, though a particular Lien may exist.

1. WHERE a person in pursuance of the directions and authority of the owner of property, delivers it to a tradesman for the execution of the purposes of his trade upon it, the tradesman to whom it is so delivered, shall not have any lien upon it against the owner for a general balance due to him from the person who delivered it on the latter's own account, if the tradesman was informed, at the time he received the property, that it did not belong to such person. (*a*) In conformity

(*a*) Muans v. Henderson, 1 East, 335. Man v. Shiffner, 2 East, 523. Snook v. Davidson, 2 Camp. 218. Upon this principle in the case of Good v. Jones, Peake's C. N. P. 176; where the plaintiff being a grazier in the country, employed a salesman to sell some

to this rule it has been decided that a carrier, who by the usage of his trade is to be paid for the carriage of goods by the consignors, has no right to retain them against the consignee for a general balance due to him from the consignor, for the carriage of other goods of the same sort: for the goods became the property of the consignee from the moment of the delivery to the carrier, and therefore could not be liable under any agreement between the latter and a third person. *(b)* And if the owner of goods consigns

oxen for him in Smithfield market, and the salesman employed the defendant as his book-keeper, who acted in that capacity for several others, and whose business appeared to be to receive the money from the purchaser, and to keep an account of the beasts sold, distinguishing what each beast sold for, and to whom it belonged, and to pay the money over to the respective owners, upon receiving an order to that effect from the salesman. It was decided, that the defendant could not retain the money for the plaintiff's oxen from him, on the ground of a balance due from the salesman to the defendant. Upon the same principle too, in the case of Grey v. Cockerill, 2 Atk. 114, it was determined, that a clerk in court who lends money to a solicitor to carry on a cause, is not entitled on that account to detain the client's papers as a pledge. The decision of Lanyon v. Blanchard, 2 Camp. 597. seems to carry this principle still further; see post. lien of insurance broker, notis.

(*b*) Butler v. Woolcott, 2 N. R. 64.

them to a tradesman for the execution of the purposes of his trade upon them, but before they arrive in the hands of the tradesman the property is transferred by the owner to a third person, who is not able to countermand them, till after they are come into the possession of the tradesman, the latter cannot retain them against such third person, for a general balance due to him from the consignor, in other accounts: accordingly, where a contract for the sale of goods was rescinded, and the property retransferred from the vendee to the vendor, while the goods were in transitu, but before they could be stopped by the vendor, were delivered at a wharf and received by the wharfinger pursuant to an order which the vendee had given before the contract was rescinded, and not countermanded; afterwards, it not appearing that the wharfinger had advanced money, or accepted bills for the vendee on the credit of the consignment of the goods to him, it was determined that he could not retain them against the vendor for a general balance due to him from the vendee, but only for the charges or expences incident to those particular goods. (c)

(c) Richardson v. Goss, 3 Bos. and Pul. 119.

2. No claim to a general lien can be maintained, where it would contravene or interfere with the prior common law right of another, not claiming under the person from whom the right to the general lien is derived. Thus the right of the consignor of goods to stop them in transitu upon the insolvency of the consignee, being considered a common law right, and therefore paramount to that of the carrier to retain for his general balance, which can be founded only on special custom; it has been determined, that an usage for a carrier to retain goods for the general balance of account between him and the consignee, cannot in any case affect the consignor's right to stop the goods in transitu; which the latter may exercise at any time, before the consignee has acquired complete dominion over the goods, upon paying the carrier for the carriage only of those particular goods. (*o*)

2. *In what cases no sort of lien can be acquired.*

1. *In cases in which the disability arises in the conduct of the party claiming the lien.* 2. *Cases in which the disability arises from the want of power to dispose of the property in which the lien*

(*o*) Oppenheim v. Russel, 3 Bos. & Pul. 42.

is claimed in the party who gives possession of it. 3. Where possession is not sufficiently given to the party claiming the lien of the property on which it is claimed.

Cases in which the disability arises in the conduct of the party claiming the lien.

1. The law will not suffer a lien to be acquired in any case by the wrongful act of the party claiming it. And, therefore, where one person pays the freight or other charges of goods belonging to another, in order to obtain wrongful possession of them, he cannot detain them against the right owner till he is indemnified for those expences. (*e*)

2. No lien can be acquired by the misrepresentation of the party claiming it, and if any one obtains possession of another's property by such means, he cannot retain it against the owner, although under the circumstances, he would have had a lien upon it, if he had gained the possession of it fairly. (*f*) But though a lien cannot be created in the first instance by misrepresentation, yet having been once fairly acquired, and lost by the pos-

(*e*) Lempriere v. Pasley, 2 T. R. 485.

(*f*) Madden v. Kempster, 1 Campb. 12.

session being afterwards relinquished, it may, under some circumstances, be revived by regaining possession of the property on which it existed, even under a false pretence. (*g*)

3. A lien cannot be acquired by the voluntary and unauthorized act of the party claiming it. And therefore if a man, having the goods of another in his possession, voluntarily, and without any authority from the owner for so doing, defrays any charges, or is at any expence or trouble concerning them, he cannot on that account retain them against the owner. (*h*) And this

(*g*) Whitehead v. Vaughan, Cooke's B. L. 566.

(*h*) Stone v. Lingwood, 1 Str. 651. The facts of this case were these: the plaintiff, being the master of a ship, had brought home a small quantity of elephants' teeth on his own account, and a large parcel on the account of the defendant, who was the owner of the ship. The defendant entered both parcels at the custom-house, and paid the duty for them both, and both were delivered to him. Upon his refusing to deliver to the plaintiff his parcel, an action of trover was brought by the latter; and the question was, whether the plaintiff, having neither paid nor tendered his part of the duty, could support the action? And it was ruled, he could. And by Eyre, C. J. the defendant had no right to detain the plaintiff's parcel, notwithstanding the money paid by him as a duty for it, was neither paid nor tendered to him, because he might have brought an action for the money, or then have

rule holds, (except in cases where the property is saved from loss *at sea*, though the possession of the property be taken, and the trouble or expence incurred about it, for the purpose of preserving it for the owner, where it has been lost by him. Thus where in trover for a dog, the defendant justified the detaining him on the

given evidence of the money paid, when it might have been deducted out of the plaintiff's damages. And the reporter adds, that the latter was done. Both the reasons assigned here by C. J. Eyre, as the ground of the decision are clearly insufficient, for it is unquestionable that a lien exists in many cases, where an action might be maintained for the same debt. A carrier, who has undoubtedly a right to detain goods, unless the money due for the carriage of them is paid or tendered, may waive this right, and bring an action for the money. And if an action of trover be brought against him for refusing to deliver the goods, the money due for the carriage of them may be deducted out of the plaintiff's damages. In the argument of Green v. Farmer, 4 Burr. 2218, Lord Mansfield declares the decision itself not to be law. But though the reasons alleged as its foundation are clearly insufficient, the decision itself does not appear to have been questioned in any other instance; and in principle it appears to be strongly supported by the rules laid down in the late decisions of Exall v. Partridge, 8 T. R. 310, and Child v. Morley, 8 T. R. 610, with regard to *voluntary payments*: in which it is fully admitted that no action can be maintained for money paid on behalf of another, voluntarily and without his authority.

ground that the dog had strayed casually to his house, and he had kept him there for the space of twenty weeks, and demanded the expence of his keep; on a case made whether the refusal to deliver up the dog amounted to a conversion of it, the defendant's counsel declined arguing the question, and the plaintiff recovered. (*i*)

And where a quantity of timber which had been placed in a dock on the river Thames, and the ropes by which it was confined, had loosened; in consequence of which it floated down the river, and was left by the tide in the towing path, where it was found by the defendant, and conveyed by him to a place of safety for the owner. It was adjudged, that the defendant could claim no lien on the timber for the expences incurred in removing and taking care of it, but was bound to deliver it to the owner. (*k*)

And this rule holds too, though the property be taken possession of under legal process, and the expence incurred be ne-

(*i*) Binstead v. Buck, 2 Bla. R. 1117.

(*k*) Nicholson v. Chapman, 2 H. Bla. 254. But it seems to have been the opinion of the court, that the expences might have been recovered by action, which, (if any could have been maintained) must have been assumpsit.

cessary to the preservation of it. Thus if a horse be distrained to compel an appearance in a hundred court, after the appearance the person who took the horse cannot justify detaining it, until he is paid for its keep. (*l*)

4. No lien can be acquired, where the party claiming it has entered into a special agreement, which shews that he relied only on the personal credit of his employer; (*m*)

(*l*) Lenton v. Cook, H. 9 Geo. 2. Bul. N. P. 45.

(*m*) Y. B. 5 Ed. 4. fol. 2. 17 Ed. 4. fol. 1. 2 Rol. Ab. 92. (m) pl. 2. 6 Yelv. 66. Collins v. Ongley, cited Brennan v. Currint, Selw. N. P. 1289. Sayer, R. 224. Bul. N. P. 45. S. C. Weymouth v. Boyer, 5 Ves. jun. 416. and see Yorke v. Greenaugh, 2 Ld. Raym. 867. Bac. Ab. Trover, p. 696. Upon the same principle in equity the circumstance of another security having been taken and relied on by the vendor of a real estate, may be evidence of his having relinquished his lien upon the estate sold. Mackreth v. Symons, 15 Ves. jun. 329. And where a specific chattel is deposited with a person upon a special trust, and under an express agreement by the depositary to restore it after the expiration of a limited period, and where from its nature no adequate compensation can be obtained for it in damages, and an action at law would be ineffectual, a court of equity will compel the depositary to deliver it up in specie after the expiration of the trust. Fells v. Read, 3 Ves. jun. 70. In Cowell v. Simpson, 16 Ves. jun. 279. Lord Eldon states it to be his opinion, that the true principle upon which the law considers the taking a security,

whether the lien to which he would otherwise have been entitled would have arisen by the common law or by the usage of trade. Thus if a person, who from the nature of his employment, has a lien by the common law upon property coming into his possession in the course of his trade for the labour or expence incurred in respect of that particular property, contracts for a specific or a reasonable sum to be paid him as a remuneration for such trouble or expence, he thereby waives the benefit of his lien. Where an agreement was entered into, whereby the sum of ten shillings and sixpence was to be paid to a farrier for curing a mare, and also a reasonable reward for keeping the mare until she should be cured; and the owner of the mare, as soon as she was cured, tendered the ten shillings and sixpence and demand-

as a waiver of the lien is not regulated by the usage of trade, nor consists in the mere rule of law, that the special contract determines the implied one: but in the inconvenience which would result, (the necessities of mankind requiring that the goods should be delivered for consumption,) from the extension of the lien for the whole period which the security has to run. For it must be presumed, either that the lien is to continue and accompany the security until payment, or that it is relinquished by the substitution of the security.

ed the mare: but the farrier refusing to deliver it, an action of trover was brought; and it was adjudged by the court, that the action lay: and by Ryder, C. J. "it is not necessary to give any opinion as to the right of a farrier to detain a beast for the money due for keeping it until it is cured; because, if a farrier have in general such right, it was in the present case waived by the special agreement to be paid a reasonable sum for the keeping. (*n*)"

And where the law would otherwise imply a lien from the general usage of trade, the parties may, by a special agreement, which shews that the property was not intended to be a pledge, prevent the application of the general rule of law to their case. Accordingly, where goods were deposited with a factor under a special contract, by the terms of which it appeared that the deposit was made for the special purpose of sale, and that the factor promised to pay over the proceeds to his employer: it was determined, that the factor could not retain the goods if not sold, for the general balance of his account arising upon other articles; because the

(*n*) Brennan v. Currint, Sayer's R. 224. Selw. N.P. 1289.

terms of the contract precluded the supposition upon which this sort of lien is founded, that the goods were deposited in the nature of a pledge. (*o*)

So too, where the plaintiffs being insurance brokers, and indebted to the defendant for effecting an insurance for them, upon his offering to get some bills discounted for them for a certain commission, entrusted a bill to him for that purpose, which he retained for the debt. It was determined, that an action of assumpsit, or case, with a count in trover, might be maintained against him for it. (*p*)

2dly. Cases in which the disability arises from the want of power to dispose of the property on which the lien is claimed in the party who gives possession of it.

1. Though liens may be derived through the acts of servants or agents acting within the scope of their employments, (*q*) and though wherever the person who delivers the possession of the property on which the lien is claimed to the person claiming it, is invested with authority to dispose of the property in that way, the latter shall

(*o*) Walker v. Birch, 6 T. R. 258.
(*p*) Judin v. Samuel, 1 N. R. 45.
(*q*) See ante, p. 28, 38.

not be defeated of the lien to which he is entitled for the trouble or expence incurred about that particular property by the owner coming forward and claiming it. (r) Where the act of the servant, agent, or other person in delivering the property is wholly unauthorized, and the pledge of it tortious against the owner, whether the property be delivered to a tradesman for the execution of the purposes of his trade upon it, or whether it be deposited for bare custody as a security for a loan made upon it, no lien can be acquired upon it by any such delivery; and the owner may recover it by action of trover from the person to whom it is delivered, without tendering him any satisfaction for money raised upon the credit of the deposit of it, or even for trouble or expence incurred upon and for the benefit of that property. (s) Accordingly where a servant having by negligence broken his master's chaise, and without his orders or knowledge delivered it to a coach-maker, who had never before been employed by his master for the purpose of repairing

(r) Hammond v. Barclay, 2 East, 227. Richardson v. Goss, 3 Bos. and Pul. 119. Weldon v. Gould, 3 Esp. R. 268.

(s) See post, lien of pawnee.

it, and the coach-maker refused to deliver it up until he was paid for the repairs, and an action of trover being brought for it by the master, contended as a defence, that he had a lien on the chaise for the repairs done to it: Lord Ellenborough said that he had no right to hold the chaise as a lien. Whatever claim of that sort he might have, he must derive it from legitimate authority. That unless the master had been in the habit of employing the tradesman in the way of his trade, it should not be in the power of the servant to bind him to contracts of which he had no knowledge, or to which he gave not his assent. It was the duty of the tradesman when he was employed, to have enquired of the principal, if the order was given by his authority; but having neglected to do so here, and the master having never employed him, the master was not liable to the demand; and the detainer of the chaise was unlawful. A verdict was accordingly found for the plaintiff. (*t*)

So too, where a factor pledged the goods of his principal: it was determined, that a factor having only authority to sell the goods of his principal, and not to pledge them, the principal might recover them

(*t*) Hiscox v. Greenwood, 4 Esp. R. 174.

from the pawnee without making any tender to him of the money advanced upon the pledge. (*u*)

2. No lien can be acquired by a creditor upon the property of a trader, whether in possession or action which is delivered by the trader to the creditor, with intent to give him a preference in the event of the bankruptcy of the trader: all dispositions of property made with such an intent being void at law, on the ground of their being fraudulent, and tending to defeat the object of the bankrupt laws. (*v*) But whether the delivery of the property is void, from being made with intent to give the creditor a preference in the event of a bankruptcy, or valid, from not being made with that intent, must be determined by the particular circumstances of each case. (*w*) There are, however, certain circumstances attending the transaction, which have been by repeated decisions, settled and determined to be, either conclusive or presumptive evidence of the

(*u*) Daubigny v. Duval, 5 T. R. 604.

(*v*) Alderson v. Temple, 4 Burr. 2239. Exparte Scudamore, 3 Ves. jun. 85. Wilson v. Balfour, 2 Campb. 579. Crosby v. Crouch, 2 Campb. 166. 11 East. 256. S. C.

(*w*) Burr. 2477.

fraud or fairness of it. But as the law upon this point is increased to a very considerable bulk by the number of decisions and nice distinctions made upon it, I shall only give a very brief statement of the result of these decisions, (*x*) referring the reader who wishes to be better informed upon the subject, to the several treatises upon the bankrupt laws, where it is more fully considered, and to which it more properly belongs.

Conclusive evidence of fraud.

Any disposition or delivery by a trader of the whole, (*y*) or of so much of his property as will disable him from carrying on trade, (*z*) unless made with the consent

(*x*) Though most of the cases which will be cited upon this subject are cases only of fraudulent assignments, without actual delivery of the property, the principle of them applies as well to cases of fraudulent delivery.

(*y*) Small v. Oudley, 2 P. Wms. 427. Worseley v. Demattos, Burr. 467. Wilson v. Day, Burr. 827. Kettle v. Hammond, Co. B. L. 89. Devon v. Watts, Doug. 86. Hassells v. Simpson, Doug. 88. Butcher v. Easto, Doug. 282. Thornton v. Hargrave, 7 East, 544; and see Montague, B. L. 58. n. (l).

(*z*) Small v. Oudley, 2 P. Wms. 427. Exparte Foord, Burr. 477. Compton v. Bedford, 1 Bla. R. 362. Hooper v. Smith, 1 Bla. R. 441. Alderson v. Temple, 4 Burr. 2235. Law v. Skinner, 2 Bla. R. 996. Harman v. Fishar, Cowp. 117. Rust v. Cooper, Cowp. 629; and see Montague, B. L. 63. n. (*t*).

of every creditor, (*a*) is conclusively fraudulent upon the face of it; though it be made as a security for future advances, (*b*) or a debt previously incurred, (*c*) or under fear of legal process, or even under actual

(*a*) Kettle v. Hammond, Co. B. L. 89. Alderson v. Temple, Burr. 2235. Harman v. Fishar, Cowp. 117. Bamford v. Baron, 2 T. R. 494. Eckardt v. Wilson, 8 T. R. 140; and see Dixon v. Baldwin, 5 East, 175; and Montague, B. L. 62. n. (*r*).

(*b*) Worseley v. Demattos, Burr. 467.

(*c*) Butcher v. Easto, Doug. 282. In Whitwell v. Thompson, 1 Esp. R. 68. it was said by Lord Kenyon, that "all the cases, without a single exception, where the assignment of his property by a trader had been deemed fraudulent and an act of bankruptcy, had been where it had been given for a by-gone and before contracted debt. But that it never could be taken to be law, that a trader could not sell his property when his affairs became embarrassed, or assign them to a person who would assist him in his difficulties, as a security for any advances such person might make to him." This position, however, can only be considered as law under this restriction, that the property sold or assigned by the trader do not amount to so much as will disable him from carrying on trade. For according to the general principle which seems to be established by the cases, the only view with which a trader can dispose of any of his property on the eve of bankruptcy is, that he may be relieved by such disposal from present pressure, and enabled to carry on trade for a longer period than he otherwise could.

arrest, (*d*) or though the creditor is in full credit at the time the disposition or delivery of the property is made. (*e*)

Presumptive evidence of fraud.

But the circumstance of the disposition or delivery of part of his effects being made voluntarily, and without the application of the creditor, (*f*) or on the eve of

(*d*) Butcher v. Easto, Doug. 282. Newton v. Chantler, 7 East, 138.

(*e*) Hassell v. Simpson, Doug. 88.

(*f*) Jacob v. Shepherd, Burr. 478. Alderson v. Temple, Burr. 2235. Harman v. Fisher, Cowp. 117. Rust v. Coop, Cowp. 629. Devon v. Watts, Doug. 86. Hassell v. Simpson, Co. B. L. 88. Thompson v. Freeman, 1 T. R. 155. Cosser v. Gough, cited Montagu, B. L. 72. n. (z). Smith v. Payne, 6 T. R. 152. Ex parte Scudamore, 3 Ves. jun. 85. Singleton v. Butler, 2 Bos. & Pul. 283. Hartshorn v. Slodden, 2 Bos. & Pul. 582. That the circumstance of the assignment being voluntary is evidence of its being fraudulent is clear from all these cases. But that it is only *presumptive* evidence of fraud is equally clear from the same cases, as well as from that of Cock v. Goodfellow, 10 Mod. 489, and the late decision of Crosby v. Crouch, 11 East, 256. 2 Campb. 166. S. C. which confirms the decision of Hartshorn v. Slodden, and in which Lord Ellenborough, C. J. says: "*Two things* are necessary to concur in order to avoid the delivery of the goods, namely, *the purpose of voluntary preference* in respect to such delivery, *and the contemplation of the bankruptcy* at the time when the goods were delivered."

bankruptcy, (*g*) will be only presumptive evidence of fraud.

And if the trader is induced to give the security of such a part of his effects, as will not altogether disable him from carrying on trade by the compulsion or even application of the creditor, (*h*) (provided such application be not collusive (*i*) nor in consequence of information officiously and spontaneously given by the trader to the creditor of the former's insolvency,) (*k*) or in consequence of a well, (*l*) or even an ill (*m*) grounded fear of legal process, though the application by the creditor is to give further security for a debt secured on an instrument not payable until a future day, (*n*) and though previous to the mak- Conclusive evidence of fairness.

(*g*) See cases cited in note (*f*).

(*h*) See cases cited in note(*f*),and Butcher v. Easto, Doug. 282.

(*i*) Per Ld. Mansfield, Alderson v. Temple, Burr. 2235.

(*k*) Singleton v. Butler, 2 Bos. & Pul. 283.

(*l*) Jacob v. Shepherd, Burr. 478. Alderson v. Temple, Burr. 2235. Harman v. Fishar, Cowp. 117. Rust v. Cooper, Cowp. 629. Smith v. Payne, 6 T. R. 152.

(*m*) Thompson v. Freeman, 1 T. R. 155.

(*n*) Singleton v. Butler, 2 Bos. & Pul. 283. Hartshorn v. Slodden, 2 Bos. and Pul. 583. Thompson v. Freeman, 1 T. R. 155. Crosby v. Crouch, 11 East, 256. 2 Campb. 166. S. C.

ing of the application the trader had an intention to give a fraudulent preference to the creditor by a delivery of the property to him, but which intention was not carried into effect until after an actual application was made by the latter, (*o*) or though the property be delivered secretly, (*p*) or though the trader himself, (*q*) or the creditor also, (*r*) know at the time the application is made, that the failure of the former is inevitable, the transaction will not be considered fraudulent.

Presumptive evidence of fairness.

But the circumstances of the delivery of the property being for a full and valuable consideration; (*s*) or, as it seems, of the trader's solvency at the time it is effected, (*t*) or its being effected in pursuance

(*o*) Bayley v. Ballard, 1 Campb. 416.

(*p*) Crosby v. Crouch, 11 East, 256. 2 Campb. 166. S. C.

(*q*) Rust v. Cooper, Cowp. 629. Thompson v. Freeman, 1 T. R. 155. Hartshorn v. Slodden, 2 Bos. & Pul. 582. Crosby v. Crouch, 11 East, 256. 2 Camp. 166. S. C.

(*r*) Yeates v. Grove, 1 Ves. jun. 280. Hartshorn v. Slodden, 2 Bos. & Pul. 582; and see Crosby v. Crouch, 11 East, 256. 2 Campb. 166. S. C.

(*s*) See Cadogan v. Kennett, Cowp. 434. and Worseley v. Demattos, Burr. 467.

(*t*) That it is evidence of fairness, see observations of Ld. Mansfield upon Cock v. Goodfellow, 10 Mod. 489. in the case of Worseley v. Demattos, Burr. 478.

of a prior fair agreement; (*v*) or being beneficial to the creditors at large, (*u*) are only presumptive evidences of the fairness of the transaction.

3. According to the original rule of relation which prevailed in the bankrupt laws, no lien could be acquired upon the property of a trader, after he had committed an act of bankruptcy; the legal effect of such act being to deprive the bankrupt of all power of charging or disposing of his property, and to avoid all subsequent transactions by him with respect to it without regard to the fairness or fraud of them. (*w*) The rigour of this rule has, however, been relaxed by the legislature by

but that, it seems to be only *presumptive* evidence. See Hassel v. Simpson, Doug. 88.

(*v*) Small v. Oudley, 2 Peere Wms. 427. The law of this case is rather doubtful. See dict. Ld. Mansfield, Harman v. Fishar, Cowp. 117. acc. Singleton v. Butler, 2 Bos. & Pul. 283. contr.

(*u*) Small v. Oudley, 2 Peere Wms. 427. Per Grose, J. Manton v. Moore, 7 T. R. 67.

(*w*) Exparte Bush, 7 Ves. 74. Billon v. Hyde, 1 Ves. jun. 326. Falkener v. Case, 2 T. R. 491. Copland v. Stein, 8 T. R. 199. Tamplin v. Diggins, 2 Camp. 312. Per Buller, J. Vernon v. Hankey, 2 T. R. 113; and Buckley v. Taylor, 2 T. R. 600. 2 Bla. Com. 485. And where the act of bankruptcy consisted in lying two months in prison, all acts subsequent to the first arrest were void. Ex parte Lee, 2 Ves. jun. 285.

four different statutes. By 1 Jac. 1. c. 15. s. 14., it has provided, that the relation to the act of bankruptcy shall not extend to the prejudice of any debtor who paid his debt to the bankrupt truly and bona fide before he understood or knew that he had become a bankrupt. And by 21 Jac. 1. c. 19. s. 14., not to purchasers for a valuable consideration, unless, in the case of such purchasers, the commission be sued out within five years after the bankruptcy. And by 19 Geo. 2. c. 32. s. 1., not to payment for goods or bills of exchange bona fide made by the bankrupt in the usual course of trade to a creditor who has no notice of the bankruptcy or insolvency.

An advance of money, or an acceptance of bills by a factor on the credit of a consignment of goods made to him by his principal, (the money advanced being more than the actual but less than the supposed value of the goods,) is not a case that can be brought within the first of these statutes, as a payment for goods sold and obviously not within the second or third: and therefore, where a factor agreed to advance a sum of money, in consideration of a consignment of goods to be made to him for sale on account of the owner, and accordingly, on the consignment being made, advanced money, and accepted bills in

favour of the consignor, and it was afterwards found that the latter had committed a secret act of bankruptcy previous to the transaction, and a commission was issued against him, after which the factor sold the goods and received the money; it was decided, that he was answerable to the assignees of the bankrupt for the value of the goods. (*y*)

But the last and most extensive relaxation of the rule of relation to the act of bankruptcy was made by 46 Geo. 3. c. 135. s. 1., by which all conveyances by, all payments by and to, and all contracts and other dealings and transactions by, and with any bankrupt *bonâ fide* made and entered into more than two calendar months before the date of the commission, are rendered valid and effectual, notwithstanding any secret act of bankruptcy previously committed.

However under the original rule of relation in all its rigour, and in cases to which none of these statutes extend, where as complete a possession of the property has been given as the situation or nature of it would admit, and not with a view to a fraudulent preference before the commission of an act of bankruptcy

(*y*) Copland v. Stein, 8 T. R. 199.

by the owner, a lien may be acquired upon it, though the full and perfect possession is not obtained until after that act has taken place. Such are the cases of property at sea, and choses in action, in which the delivery of the muniments or documents of the right of property are deemed sufficient in law to create a lien. (*y*)

Property at sea.

Thus, where a cargo at sea was made a collateral security for the payment of a bond, the delivery of the invoice and the bills of lading, and of several indorsed policies of insurance on the goods, was held sufficient to give the creditor a lien on the cargo, when actual possession could not be taken before the bankruptcy of the debtor. (*z*)

And where a policy of insurance on goods at sea, and letters of advice have been delivered before an act of bankruptcy, as a security for money advanced to a

(*y*) Many of the cases which will be cited upon this subject are more properly cases of mortgages, or liens in equity, where the general property is transferred at law conditionally, than of pawns or legal liens, by which only a special property is acquired by the pawnee, the general property still remaining in the pawnor. But they equally serve to shew the general principle. See Cullen, p. 302 to 310. Cooke, B. L. chap. 8. sect. 11. Montague, p. 69, 302, 341, 350.

(*z*) Brown v. Heathcote, 1 Atk. 160.

trader, together with an undertaking by him to indorse the bill of lading to the lender immediately upon its arrival. If the bill of lading be indorsed, and possession of the goods taken by the indorsee, immediately upon their arrival, though not until after the bankruptcy of the trader, the former will have a lien upon them against the assignees. (*a*)

Choses in action. (*b*)

If a policy broker, to whom a trader is indebted before his bankruptcy for premiums, be at the time of the trader's bankruptcy in possession of a policy of insurance of the bankrupt's, upon which losses have happened. The broker has a lien upon the money which he receives from

(*a*) Lempriere v. Pasley, 2 T. R. 485., as between a person who has an equitable lien and a third person who purchases the thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. For the title of him who has both a fair possession and an equitable title, shall be preferred to that of a mere equitable interest, per Ashhurst, J. delivering the opinion of the court. And see opinion of Buller, J. in Lickbarrow v. Mason, 6 East 25, in notis.

(*b*) For the cases in which it is necessary that notice should be given to the debtor upon the assignment of a chose in action, see cases collected in Montague, B. L. 343. note (*n*), and Jones v. Gibbons, 9 Ves. jun. 417.

the underwriters after the bankruptcy. (c) It has likewise been decided, that where a factor sells the goods of the principal before the bankruptcy of the latter, and can maintain an action against the purchaser in his own name, or discharge him by his receipt, he has a lien on the price in the hands of the purchaser, and may retain it though not paid to him until after the bankruptcy of his principal. (d) And where a trader gave his creditor before bankruptcy, an order upon a person in a public office "out of the money due to the trader, and that would become due, to pay the creditor for value received," and the creditor delivered the order to the officer. It was determined, that he acquired a lien upon the money due from the office to the trader, notwithstanding the latter committed an act of bankruptcy before the money was paid pursuant to the order. (e) But, where a person had accepted several bills of exchange on account; and for the accommodation of a trader, and the trader previous to his committing an act of bankruptcy, executed

(c) Whitehead v. Vaughan, Co. B. L. 566.

(d) Drinkwater v. Goodwin, Cowp. 251.

(e) Row v. Dawson, 1 Ves. 331. Yeates v. Grove, 1 Ves. jun. 280.

a power of attorney, to the acceptor of the bills, to receive money due to the trader, and hold it as a security to himself, to answer the extent of his engagements; it was determined, that such acceptor had no lien upon money received after the bankruptcy of the trader under the power of attorney, and that the assignees of the trader might recover it in an action for money had and received. (*f*)

4. No lien can be acquired, unless the property on which it is claimed come into the possession of the party claiming it, or of some one who can be considered as his agent for the purpose of receiving it. (*g*)

(*f*) Hovill v. Lethwaite, 5 Esp. R. 158.

(*g*) Kinlock v. Craig, 3 T. R. 119, 783., per Buller, J. Lickbarrow v. Mason, 6 East 25. in notis. In Falkener v. Case, 2 T.R. 494. 1 Bro. C.C. 125. S.C. a ship at sea was assigned together with a policy of insurance on it for a debt due from the owner. But the policy being at the time of the assignment in the hands of the debtor's broker, who claimed a lien upon it, and would not part with it; it was agreed between the debtor and creditor, that it should remain with the broker, who upon having his lien satisfied by the assignees of the debtor delivered the policy up to them. Upon which the creditor to whom it had been assigned, filed a bill against them in Chancery, and the Lord Chancellor made a decree in his favour, observing "There seems to me to be no difference in cases where effects which have been in the possession of the pawner are

Thus where bankers having fraudulently sold out stock belonging to a customer which stood in their names, and applied the proceeds to their own use, and while they remained solvent wrapped up certain bonds belonging to them in an envelope inscribed with the customer's name, and enclosing a memorandum stating that they had deposited the bonds with him as a collateral security for his stock, and a promise to replace it, and then deposited the parcel among the securities belonging to other persons who dealt with them; but having given no information to the customer of any of these circumstances, until the eve of their bankruptcy, when they sent him the parcel with the bonds, saying, they must stop payment the next morning. It was determined that the customer acquired no lien on these bonds against the assignees of the banker; because he had not sufficient possession of them, until they were sent him by the bankers, upon the eve and in contemplation of their bank-

pledged and where goods that he has a property in are left in the hands of a third person; I consider them equally as pledges. (1)

(1) According to the distinction laid down in Ryall v. Rowles, 1 Atk. 165. 1 Ves. 348. S. C. this is a case of mortgage and not of pawn. See post. lien of pawnee.

ruptcy ; and the bankers could not be considered as the agents of the customer for receiving the bonds, he being entirely ignorant of the transaction at the time they were deposited. (*h*)

(*h*) Wilson v. Balfour, 2 Campb. 579.

CHAP. V.

By what means the right of Lien is or is not divested or waived.

By parting with possession when divested.

1. LIENS at law exist only while the party entitled to them continues in possession of the property in which they have been acquired; and if he once relinquishes that possession after the lien attaches, the lien is gone. (*a*) For by parting with possession of his security, he shews, that he trusts merely to the personal credit of his debtor; and if liens were allowed to remain upon goods, after they had been negotiated and sold, the consequences would be highly injurious to trade; as no dealer could in that case know when he purchased goods safely. Upon this principle where a factor having a lien on goods of his principal for the general balance of his account, gave orders to the warehouseman, in whose

(*a*) Jones v. Pearle, Str. 556. Exparte Shank, 1Atk. 254. Kruger v. Wilcox, Ambl. 252. Wilkins v. Carmichael, Doug. 97. Judgment of Buller, J. 6 East 25. in notis. Sweet v. Pym, 1 East 4. M'Combie v. Davies, 7 East 5.

warehouse they were, to deliver them up to a broker employed by the principal, on the occasion, telling the broker at the same time that the principal intended to sell them himself to save commission, and the broker sold them and made out bills of parcels to the principal, without taking any notice of the factor: it was decided, that such conduct on the part of the factor amounted to the same thing, as if he had delivered the goods up in specie to the principal, and that he had therefore lost his lien upon them. (*b*)

In conformity to the same rule, where a tradesman having a lien on goods of his employer placed in his hands, in the course of his trade, for the general balance of his account, delivered them to a ship carrier to be conveyed on the account and at the risk of the owner, though the latter circumstance was unknown to the carrier; it was determined, that having once given up the possession of the goods he could not afterwards recover his lien by stopping them in transitu and procuring them to be redelivered to him by virtue of a bill of lading signed by the carrier during the course of voyage. (*c*)

(*b*) Kruger v. Wilcox, Ambl. 252.

(*c*) Sweet v. Pym, 1 East 4.

When not divested.

But where a broker after having parted with possession of a policy of insurance, on which he had a lien for his general balance to his principal, obtained it again, under pretence of receiving the loss from the underwriters, but in fact with a view to hold it as a security: it was holden, that the lien revived, when the subject of it came again into the hands of the broker. (*d*)

And though liens cannot be transferred by those who have fairly acquired them against the owners, by a tortious delivery of the subject to third persons: where a party having a lien on goods against the owner, delivers them over to a third person with notice of his lien, and purporting to transfer his right of lien to the other as his servant, and in his name, and as a continuance in effect of his own possession, his right will not in that case be divested. (*e*) And if a factor, being in ad-

(*d*) Whitehead v. Vaughan, Co. B. L. 566.

(*e*) See Man v. Shiffner, 2 East 529. and dict. Lord Ellenborough, Ch. J. in M'Combie v. Davies, 7 East 5. There is no doubt from the several decisions upon this subject, that by relinquishing the possession of the goods *to the owner himself or his agent*, the party having a lien upon them, loses it; neither is there any doubt, from the cases of Daubigny v. Duval, 5 T. R. 604. and M'Combie v. Davies, that a lien cannot be

vance for his principal, disposes of the goods, making the buyer debtor to him-

transferred to the pawnee by a tortious pledge of the goods on which it is claimed. But the decisions do not appear to agree so perfectly upon the point, whether the pawnor himself loses the benefit of his lien by such a pledge. For it is to be observed, that in the case of Daubigny v. Duval, a tender was made to the factor who had tortiously pawned the goods of the balance due to him previous to the commencement of the action against the pawnee. And Buller, J. in saying, "If the principal has redeemed himself as against the factor, he need not enquire into the transaction between the factor and the pawnee," seems to consider a tender to the factor necessary; and consequently that his lien continued, though he had transferred the possession of the goods to the pawnee. In the case of Sweet v. Pym, 1 East 4, Ld. Kenyon, C. J. said, "the right of lien has never been carried further than while the goods continued in the possession of the party claiming it. In the case of Kinlock v. Craig, 3 T. R. 119. it was strongly insisted, that the right extended beyond the time of actual possession; but the contrary was ruled by the court, and afterwards by the House of Lords." It is to be observed, however, that in this case of Sweet v. Pym, as well as in that of Kruger v. Wilcox, Ambl. 252. the possession of the goods was delivered up to a person, who was considered as the agent of the owner. And in the case of Kinlock v. Craig, actual possession was never obtained by the party claiming the lien. In the case of Lickbarrow v. Mason, 6 East 25. in notis, it is laid down generally by Buller, J. that by parting with possession the lien is lost. In the case of M'Combie v. Davies, 7 East

self, he retains a lien upon the price in the hands of the buyer, who cannot after notice pay it to the principal, or his representatives. (*f*) And where the holder of a bill of exchange gave the drawee a letter from the drawer, which contained a navy bill, as the fund out of which the bill of exchange was to be paid, and which had been given to the holder as a security for the payment of the bill of exchange, and the drawee kept the navy bill and received the proceeds: it was adjudged, that the holder had not lost his lien on the navy bill by such resignation of possession. (*g*) A captain of a ship too, who has a lien upon the cargo for freight, does not, it seems, part with his lien by depositing

5. It was decided, that a broker could not transfer his right of lien by a tortious pledge of his principal's goods; and that the principal might recover them from the pawnee, without tendering him the balance due to the broker; and so far it agrees with the decision of Daubigny v. Duval. But there does not appear, in the case of M'Combie v. Davies, to have been any tender to the broker, as there was in Daubigny v. Duval to the factor, previous to the commencement of the action against the pawnee; though the broker was in advance to his principal in the former case, as well as the factor in the latter, and though the pledge was equally tortious in both.

(*f*) Drinkwater v. Goodwin. Cowp. 251.

(*g*) Pierson v. Dunlop, Cowp. 571.

the cargo in the king's warehouse pursuant to the regulations of an act of parlialiament concerning the revenue. (*h*)

There are some cases too in which the possession of the property, on which the lien exists, may be given up to the owner himself without the lien being divested. Thus, if the commodity upon which the party has a lien, be of a perishable nature, he may safely part with it to the owner, upon a proper agreement with him, that the lien shall await the event of an application to a court of law or equity. (*i*) And where the property upon which the lien exists, is delivered up to the owner upon the faith of an assignment, which afterwards turns out to be invalid; *it seems* that the party is still entitled to the benefit of his lien. (*k*)

2. Liens acquired without fraud or collusion before an act of bankruptcy is committed by the person upon whose property they are claimed, are not divested by his subsequent commission of such act; the assignees taking the bankrupt's

By bankruptcy not divested.

(*h*) Per Lord Kenyon, Ward v. Felton, 1 East 507. Abbot 276.

(*i*) Exparte Ockenden, 1 Atk. 235. and Copland v. Stein, 8 T. R. 199.

(*k*) Vernon v. Hankey, 2 T. R. 113.

property subject to the same equitable liens as those under which the bankrupt himself enjoyed it. (*l*) For the general principle of the bankrupt laws, that all the creditors of the bankrupt shall be placed upon an equal footing, does not extend to such as have fairly acquired a lien upon his property: because the other creditors trusted to the personal credit of the bankrupt, while those who had liens trusted only to the things which were the subjects of those liens, and not to the personal credit of the owner. Nor does the allowance of such liens upon the whole tend to the prejudice of the creditors at large, whether the liens be acquired by a mere pawn of the property, or for work done upon it in the course of trade; for in the former case the money lent to the bankrupt would never have become a part of his assets, if the thing were not pledged to raise the loan; and in the latter case the value of the property would not contribute so much to increase the fund

(*l*) Orlebar v. Fletcher, 1 Peere Wms. 737. Walker v. Burrows, 1 Atk. 94. Brown v. Heathcote, 1 Atk. 162. Exparte Dumas, 1 Atk. 232. Lempriere v. Pasley, 2 T. R. 485. and cases collected. Taylor v. Wheeler, 2 Vern. 566, note (1) last ed. And see Sir Samuel Romilly's act, 46 Geo. 3. c. 135. s. 1.

out of which the other creditors were to be paid, if the work were not done upon it.

3. If a person having a lien upon goods in his possession when they are demanded of him, claims to detain them upon a different ground, making no mention of the lien, it will be considered as a waiver of it, and trover may be maintained against him without evidence of any tender having been made of the amount of his lien. (*m*)

4. But no lien once fairly acquired shall be divested, while the property on which it exists remains in the possession of the party claiming the lien, by the owner's aliening the property to a third person. For such person, though a *bonâ fide* purchaser must take it subject to the lien. (*n*)

Lien of Attornies and Solicitors.

The attornies and solicitors of the different courts of law and equity have a lien for their costs upon all papers of their

When a lien can be claimed upon papers.

(*m*) Boardman v. Sills, 1 Campb. R. 410. n.

(*n*) Godin v. London Assurance Company, Burr. 489.

clients that come into their possession in those characters for the purpose of business; and though such papers do not come into their hands in the particular cause, or on the particular occasion from which their demand arises. In the court of Chancery they are permitted to retain title-deeds. (*a*) And it has been admitted, that an attorney has a lien upon court-rolls, and other papers which come into his hands as steward of a court, and receiver of rents, until he is paid what is due to him from the proprietor; and the court will not compel him to

(*a*) Anon. 12 Mod. 554. Mitchell v. Oldfield, 4 T. R. 123. Exparte Nesbitt, 2 Scho. and Lefr. R. 279. An agent in town has a lien upon papers in his hands not immediately against the client, but through the medium of the solicitor in the country employed by the client. The agent having a right to retain the papers from the client, until whatever remains due from him to the country solicitor is paid to the agent, as far as it will go in satisfaction of his demand against such solicitor. Ward v. Hepple, 15 Ves. jun. 297.; and see 16 Ves. jun. 164. And if a client change his solicitor during the cause, the former solicitor will have a lien upon papers in his hands for his costs: but the court will not allow the solicitor to stop the progress of the cause by any other means. Merryweather v. Mellish, 13 Ves. jun. 161. O'Dea v. O'Dea, 1 Scho. and Lef. 315. Twort v. Dayrell, 13 Ves. jun. 195. And if a solicitor

deliver them up without satisfaction of that lien.

And where an order is obtained for taxing an attorney's bill, and delivering all books, papers, &c. upon the back of which the prothonotary indorses his allocatur, the attorney is entitled in the first instance to the possession of it, for the purpose of enforcing payment of his bill. (*b*)

This practice of allowing attornies a lien upon the papers of their clients, is not, according to Lord Mansfield, of very ancient date, but was established on general principles of justice. (*c*).

When a general lien cannot be claimed upon papers.

But though an attorney has in every case a particular lien upon papers, until he is recompensed for the trouble of drawing them, where the property in papers at the time of the delivery of them by the client

declines proceeding to a hearing in the court of Chancery for his client, he will have no lien upon any fund in court. Cresswell v. Biron, 14 Ves. jun. 271.

(*b*) Alger v. Hefford, 1 Taunt. 38.

(*c*) Doug. 104: and see 16 Ves. jun. 280. At a trial at Nisi Prius, Pasch. 6 W. & M. where A. purchased the interest of a lease for years, and the writing was left in the hands of B. an attorney, to draw an assignment of it; and B. drew it, and it was sealed; but B. refused to deliver it until A. paid for it. Upon which A. brought trover against B. for the deed. It

to the attorney is in a third person, the attorney cannot detain them against the owner for a debt due from the client. (*d*) And though a solicitor have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, so also is the solicitor; the right of lien existing only as between his client and him. (*e*) And if a tenant for life give deeds into an attorney's hands, the attorney has no lien upon them against the remainderman; for that would enable a tenant for life to charge a remainderman, and to create a greater interest in another than he himself possessed. (*f*)

If writings too are delivered to an attorney under a special agreement, or for a particular purpose, upon a special trust, not to be subject to the general lien, he

was ruled by Holt, C. J. that the action will lie, because B. might have an action for what he deserved, but that he could not detain for it. Anon. ex rel. Magistri Place, 1 Ld. Raym. 738.

(*d*) Exparte Bush, 7 Vin. Ab. 74. Exparte Bell, 18 Aug. 1803. Co. B. L. 429. This is considered as a doubtful point in Bac. Ab. tit. Attorney (*f*)

(*e*) Furlong v. Howard, 2 Scho. and Lef. 115.

(*f*) Exparte Nesbitt, 2 Scho. and Lef. 279.; and see Hoare v. Parker, 2 T. R. 376.; and post, lien of pawnee.

cannot detain them. Thus where the plaintiff had an estate mortgaged to him, and the defendant who was an attorney, and who drew the mortgage, did by that means get all the deeds relating to the title into his possession, and refused to deliver them to the plaintiff, unless the mortgagor would pay a debt which the defendant pretended to be due from him: upon a motion for a rule to deliver up the deeds to the plaintiff upon payment of what was due for drawing and engrossing the mortgage, the court was of opinion, that though an attorney might detain papers until the money be paid for drawing them, he cannot detain any writings which are delivered to him upon a special trust, even for the money due to him in that very business; and a rule was accordingly made for delivering up the deeds. (g) And if an attorney or solicitor take security from his client for the money due to him, he thereby gives up his lien for the sum secured upon

When no lien can be claimed.

(g) Lawson v. Dickenson, 8 Mod. 306. The case, however, exparte Sterling, 16 Ves. jun. 258. decides, that a mere delivery of papers for a particular purpose, as for preparing a mortgage, will not prevent the attorney from having a general lien, there being no special agreement to that effect.

any papers then in his possession, or which may come into his possession afterwards. (*h*)

Though an attorney is entitled to a lien upon papers which come into his hands before the bankruptcy of his client, as wel against the assignees, as against the bankrupt, according to the general rule of law that no one can subject his property to the lien after he is become a bankrupt, papers received from the client after his bankruptcy cannot be retained; (*i*) and where the act of bankruptcy consists in lying two months in prison, no lien can be acquired on papers delivered after the first arrest. (*k*)

Lien upon judgments.

Attornies and solicitors of the several courts have likewise a lien upon judgments recovered by their clients for their bill of costs. And they are not only allowed to retain the money if it come into their hands for the amount, (*l*) but courts both of law and equity have now carried it so far, that an attorney or solicitor may obtain an order

(*h*) Cowell v. Simpson, 16 Ves. jun. 275.

(*i*) Exparte Bush, 7 Vin. Ab. 74. Exparte Bell, Co. B. L. 429.

(*k*) Exparte Lee, 2 Ves. jun. 285.

(*l*) Mitchell v. Oldfield, 4 T. R. 123. Welsh v. Hole, Doug. 226. Taylor v. Popham, 15 Ves. jun. 72. But n the case of Craddock v. Glin, 12 Mod. 657., where

to stop his client from receiving money recovered in a suit in which he has been employed for him, until his bill is paid. (*m*) And if the defendant's attorney pay to the plaintiff himself the debt and costs recovered, after notice from the plaintiff's attorney not to do so, because his bill is not satisfied, the defendant's attorney will be liable to pay over again to the plaintiff's attorney the amount of his lien on such debt, and costs of suit, (*n*) though the plaintiff threatened to take the defendant in execution, unless the money due to him was immediately paid. (*o*)

But if the plaintiff compromise the debt

a suit was brought against an attorney for money received to the plaintiff's use, and the attorney having applied part of the money to pay himself for the labour and expence he had incurred in a cause in which the plaintiff had employed him, moved to have his bill taxed, and an allowance of what was due; the court refused to interpose for that purpose.

(*m*) Per Lord Mansfield, Wilkins v. Carmichael, Doug. 104. Welsh v. Hole, Doug. 226. In this case Sir J. Burrows mentioned to the court that the first instance of such an order was in the case of one Taylor of Evesham, about the time of a contested election for that borough. And Lord Mansfield said, that he himself had argued the question in the court of Chancery.

(*n*) Welsh v. Hole, Doug. 226.

(*o*) Read v. Dupper, 6 T. R. 361.

and costs with defendant, before the plaintiff's attorney has been paid his bill, the court will not oblige the defendant to pay him unless he gave the defendant notice, before the compromise, not to settle with the plaintiff, until his bill should be discharged. (*p*)

An attorney has likewise a lien for his bill of costs on money levied by the sheriff under an execution upon a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party against whom the execution issued, to retain the money in his hands, and that the court would be moved to set aside the judgment for irregularity; and notwithstanding a docquet has been struck against the client, who has become a bankrupt. (*q*)

But where the plaintiff after having charged the defendant in execution dies, and the defendant's wife takes out administration to the plaintiff, the plaintiff's

(*p*) Welsh v. Hole, Doug. 226.

(*q*) Griffin v. Eyles, 1 H. Bla. 122. The assignees of a bankrupt cannot take out of court money paid in by the defendant in an action at the bankrupt's suit, until they have paid the attorney of the latter his bill. Owston v. Bryan, Barnes, 115.

attorney will have no lien upon the judgment, so as to prevent the court from discharging the defendant on motion. (*r*)

An attorney has also a lien upon a sum awarded in favour of his client, where the cause is referred to arbitration, as well as upon a sum recovered by judgment; and if the defendant after notice from the plaintiff's attorney to pay him the amount of the damages and costs awarded, pay it over to the plaintiff himself, the attorney may compel a repayment of it to himself, and will not be prejudiced by a collusive release from the plaintiff to the defendant. (*s*)

There is, however, it should be observed, a considerable difference between the practice of the court of King's Bench, and that of the court of Common Pleas, with respect to the lien of attornies on judgments recovered for their clients. In the court of King's Bench, the attorney is holden to have a lien upon the judgment paramount to any claim of set off by the parties. (*t*) And though that court will not interfere so as to prevent the plaintiff

(*r*) Pyne v. Erle, 8 T. R. 407.

(*s*) Ormerod v. Tate, 1 East, 464.

(*t*) Glaister v. Hewer, 8 T. R. 70. Sellon's Pract. 451.

from settling his own cause, yet they will not allow the defendant in one cause to set off the costs recovered by him in another against the plaintiff, until the lien of the plaintiff's attorney upon the debt and costs recovered against the defendant is satisfied, or an undertaking is entered into to that effect; (*u*) though the same attorney who claims the lien was employed in both causes. (*v*) But, according to the practice of the court of Common Pleas, an attorney has only a lien subject to the equitable claims of the parties to the suit, (*w*) and will not be allowed to prevent a set off in costs between them by any claim of lien upon such costs. (*x*) Accordingly, where there were several defendants, some of whom suffered judgment by default, while the others went to trial and obtained a verdict; the court of Common Pleas permitted the costs and damages on the judgment by default to be deducted from the costs taxed on the postea to those

(*u*) Mitchell v: Oldfield, 4 T. R. 124.

(*v*) Morsland v. Pasley, 2 H. Bla. 441, n. (a).

(*w*) Schoole v. Noble, 1 H. Bla. 23. Nunez v. Modigliani, 1 H. Bla. 217. Roberts v. Mackoul, cited by counsel in Thrustout dem. Barnes v. Crafter, 2 Bla. R. 827. Per Rooke, J. Swaine v. Senate, 2 N. R. 99.

(*x*) Hall v. Oddy, 2 Bos. & Pul. 28. Rhodin v. Darly, 1 N. R. 22.

defendants who had a verdict, (on affidavit that the former defendants acted under the authority of the latter, who had undertaken to pay costs,) notwithstanding a claim of lien by the attorney on the costs. (y) Nor will the court of Common Pleas depart from the rigour of this rule, though it should appear that the client was insolvent, and there was no other fund out of which the attorney could be paid. (z) The same principle appears to be followed in the court of Chancery with respect to the lien of solicitors on costs, where different demands arise in the same cause, as in the court of Common Pleas; the costs in such case being arranged according to the equities of the parties, allowing the

(y) Schoole v. Noble, 1 H. Bla. 23.

(z) Vaughan v. Davies, 2 H. Bla. 440. Dennie v. Elliott, 2 H. Bla. 587. In the case of Hall v. Oddy, 2 Bos. & Pul. 29. Ld. Eldon, C. J. said, he found this to be the settled practice of the court of Common Pleas with much surprize, since it stood in direct contradiction to the practice of every other court, as well as to the principles of justice. Heath, J. and Rooke, J. said they had no objection to have the practice reconsidered. But Rooke, J. added, that it did not appear to him unfair as it then stood, the attorney looking in the first instance to the personal security of his client: and afterwards, in the case of Swaine v. Senate, 2 N. R. made the same observation.

solicitor a lien only upon the balance remaining under that arrangement. (*a*) But though the courts will none of them interfere on behalf of the attorney, where the client has fairly and honestly terminated the affair with his adversary, and the *whole* debt and costs have been paid, (*b*) none of the courts will permit an attorney to be defeated of his remedy for his costs, by a collusive settlement between his client and the other party; (*c*) and accordingly, where a client, at whose suit a defendant was in custody for non-payment of costs taxed for scandal and impertinence, executed a mere voluntary release to the defendant without the knowledge of the clerk in court, the Lord Chancellor would not discharge the defendant till he had paid the clerk his fees. (*d*)

Lien of Clerks of the several Courts.

Clerk in Chancery.

A clerk in Chancery has a lien upon

(*a*) Taylor v. Popham, 15 Ves. jun. 72.

(*b*) Doug. 238. 2 Ves. 25.

(*c*) Swaine v. Senate, 2 N. R. 99. Ormerod v. Tate, 1 East, 464.

(*d*) 2 Ves. 25. 1 Bac. Ab. p. 304.

papers in his hands till his bill is paid; and where a country client employs an attorney or solicitor in the country, in a cause in Chancery, and the solicitor employs a clerk in Chancery, and the client in the country pays the solicitor his bill, but the solicitor neglects to pay the clerk in Chancery; though the country client is not bound to pay the clerk in Chancery, the court will allow the latter to retain any papers he may have in his possession. (*e*)

A six clerk is entitled to retain papers in his hands for his fees, though the client has paid his solicitor, and the solicitor has satisfied the clerk in court the whole of his bill; (*f*) and a sworn clerk cannot retain from a six clerk his proportion of the fee, though the former has given credit to the client. (*g*) Six clerk.

But a clerk in court who lends money to a solicitor to carry on a cause, shall not be entitled to detain the papers of the

(*e*) Farewell v. Coker, 2 P. Wms. 460. The court of K. B. will grant a rule for the clerk of the crown office, or a clerk in court, where their bills have been included or taxed in the attorney's bill, to be paid immediately by the client. Waldron's case, 2 Str. 1126. Rex v. Smollet, 3 Burr. 1313.

(*f*) Taylor v. Lewis, 2 Ves. 111. 3 Atk. 727. S. C.

(*g*) Ex parte Six Clerks, 3 Ves. jun. 589.

client as a pledge for the money so advanced. (*h*)

Clerk of assize.

Whether a clerk of assize is entitled to a lien upon papers in his hands for his fees remains undecided. In the case of Rex v. Bury, Doug. 185, note 26., which came on upon a rule to shew cause why an attachment should not issue against the defendant, who was a clerk of assize on the Norfolk circuit, for not obeying a writ of certiorari to remove an indictment for murder, and a special verdict founded upon it, in the case of Rex v. Bothwick, the defendant insisted, that he had a right to retain the record till he should be paid his fees for drawing, engrossing, &c. which the attorney for the prisoner refused to pay, on the ground of their being exorbitant. However on the attorney's undertaking to pay as much as should, on a reference to the master, be reported to be due, the record was returned into the court: upon which the rule was discharged, Lord Mansfield saying that he should be very unwilling to determine that a clerk of assize had a lien on the records of the court for his fees; for that he foresaw great inconvenience from such a doctrine.

(*h*) Grey v. Cockerill, 2 Atk. 114.

Lien of Bankers.

Bankers have a lien upon all paper securities of their employers in their possession, not only for debts accruing on the particular account for which the securities were deposited, but also for a general balance due to them on other accounts from the same employer. (*a*)

But if the banker receive any particular security under such special circumstances, as amount to evidence of an agreement to waive his right to a general lien upon it, he cannot afterwards retain it for a general balance due to him. (*b*) Accordingly, where a banker being in advance to his employer to the amount of fourteen hundred pounds, received from him securities as a pledge for one thousand only; it was determined, that he had no lien upon those securities for any further sum than the thousand pounds. (*c*)

Where, however, a person lodges bills with his banker payable at a future date,

(*a*) Jourdaine v. Lefevre, 1 Esp. R. 66. Davis v. Bowsher, 5 T. R. 488; and see Savill v. Barchard, 4 Esp. 53.

(*b*) Davis v. Bowsher, 5 T. R. 488.

(*c*) Vanderzee v. Willis, 3 Bro. C.C. 21. see lien of pawnee, note (*f*).

and the banker advances him a sum to the amount of part of the bills so lodged, and enters the discount upon some bills selected from those so lodged, the banker does not by such selection waive his lien upon the remaining bills. (*d*)

Lien of Calico Printers.

A calico printer has not only a particular lien upon linen placed in his possession for the execution of the purposes of his trade, for work done to that linen, but also for a general balance due for printing other linen for the same employer. (*a*)

But this lien of the calico printer for his general balance is confined to such general balance, as arises from work done by him in the course of his trade, and cannot be claimed for debts due on other accounts from his employer. (*b*)

Lien of Carriers in general.

Carriers have a particular lien.

Every common carrier is (c) warranted

(*d*) Davis v. Bowsher, 5 T. R. 488.

(*a*) Exparte Andrews, Co. B. L. 429. Weldon v. Gould, 3 Esp. R. 268.

(*b*) Weldon v. Gould, 3 Esp. R. 268.

(*c*) Every person who undertakes generally to carry

by the common law to detain goods delivered to him for conveyance, until the price of the carriage of those particular goods is paid; *(d)* upon the same principle that innkeepers and other bailees, whom, from the nature of their employment the law obliges to receive goods, are on that account allowed a lien on them, until a proper compensation be made for the trouble or expence incurred by the bailment. For by the same law the carrier is compellable to receive and carry the goods of any one who offers them for

because compellable to take goods.

the goods of all persons indifferently for hire, as masters and owners of ships, lightermen, hoymen, and proprietors of waggons, come under the denomination of common carriers. Gisbourn v. Hurst, 1 Salk. 249. Bac. Ab. tit. Carriers. And if the proprietor of a stage coach take a distinct price for the carriage of goods, he shall be deemed a common carrier. 2 Show. 128. Middleton v. Fowler, 1 Salk. 282. But a hackney coachman is not a common carrier within the custom of the realm, Com. R. 25. Nor is the post-master general, Lane v. Cotton, 1 Ld. Raym. 646. Whitfield v. Lord Le Despencer, Cowp. 754.

(*d*) Skinner v. Upshaw, Ld. Raym. 752. and per Holt, C. J. Yorke v. Grenaugh, Ld. Raym. 867. Rushforth v. Hadfield, 6 East, 519. 7 East, 224. But a carrier or warehouseman has no lien on goods for booking or warehouse room, when the goods are taken by the owner from the waggon, and have never been in the warehouse. Lambert v. Robinson, 1 Esp. R. 119.

that purpose, (e) provided he has sufficient convenience for such carriage, and a reasonable reward is tendered him at the time. (f) And for this reason he is not bound to enquire into the title of the person who delivers the goods to him; and may retain them against the true owner until the carriage be paid; though the latter should prove, that they were stolen from him by the person from whom the carrier received them. (g) But no carrier

Though the goods are stolen.

(e) Yorke v. Grenaugh, Ld. Ray. 867. Kirkman v. Shawcross, 6 T. R. 14. Oppenheim v. Russel, 3 Bos. & Pul. 42.

(f) 2 Show. 327. Per Holt, C. J. Lane v. Cotton, 12 Mod. 484. Ld. Raym. 652,4. Though an action will lie against a carrier for refusing to take a packet proper to be sent by him, if his horses are not loaded or his waggon not full, no action will lie for such refusal if his horses be loaded or his waggon full. Bul. N. P. 70. and if a man come to lade goods on board a ship at an unseasonable hour the master is not obliged to take them in. Morse v. Slue, cited by Holt, Ch. J. Lord Raym. 652. A carrier may also make a special contract or refuse to take goods in extraordinary cases, but upon extraordinary terms, Gibbon v. Paynton, 4 Burr. 2298. And of late years they have been allowed to limit their responsibility very considerably by special notices. Nicholson v. Willan, 5 East, 507. Clay v. Willan, 1 H. Bla. 298. Izett v. Mountain, 4 East, 371.

(g) Case of the Exeter carrier cited by Lord Holt, in Yorke v. Grenaugh, 2 Ld. Raym. 867.

can, by the common law, claim a lien for his general balance, or to any greater extent than the carriage price of the particular goods. Such a lien may indeed be established in this as well as in any other case by proof of an express contract for it; or it may be implied from the general usage of trade; (*h*) or the particular mode of dealing between the parties themselves. (*i*) But the frequent attempts made by carriers of late years to alter the situation in which the law has placed them, by limiting their responsibility, on the one hand, by special notices, and on the other by extending their lien so as to cover their general balances, have rendered the courts extremely jealous of admitting such an extension; and accordingly in the case of Rushworth v. Hadfield, 6 East 519, 7 East 224, it was determined by the court K. B. that the claim of carriers to a lien for their general balance was contrary to the policy of the common law, and the interest of trade, and by no means necessary for their own convenience. To establish such a claim on general usage

(*h*) Aspinall v. Pickford, 3 Bos. & Pul. 44. n. But see Lord Ellenborough's observations upon this case in Rushforth v. Hadfield, Smith's R. 637.

(*i*) Rushforth v. Hadfield, 6 East, 519. 7 East, 224.

the proof must be very strong; and evidence of a few recent instances of detainers by carriers for their general balance would not be sufficient to furnish an inference that the party who dealt with the carrier had knowledge of the usage, and thence to warrant a conclusion, that he had contracted with reference to it, and adopted the general lien into the particular contract. But it was at the same time admitted by the court, that either the general usage of trade, if notorious, uniform, and long established, or the previous usage of the parties between themselves, if clearly proved, would be sufficient evidence of a contract for a general lien.

In conformity with the rules by which all the liens at common law are governed; if the carrier parts with the goods out of his own or his agent's hands after the lien has attached, the lien is gone. And an usage for carriers to retain goods cannot be supported in opposition to the consignor's right to stop in transitu. *(k)* Neither has a carrier, who by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, any right to de-

(*k*) Oppenheim v. Russel, 3 Bos. & Pul. 42. Lickbarrow v. Mason, 6 East, 25. in notis.

tain them against the consignee, who has paid the price of them for the carriage of other goods of the same sort sent by the consignor. (*l*)

Lien of Carriers by Water.

Owners and masters of *general* (*a*) ships and vessels carrying goods for hire on the high seas or on navigable rivers, as hoymen and lightermen, are common carriers by the custom of the realm, and being under the same obligation, and subject to the same responsibility by the common law as carriers by land, (*b*) are entitled by that

(*l*) Butler v. Woolcot, 2 Bos. & Pul. N. R. 64.

(*a*) By the term *general* ship, is meant a ship which is employed by the masters or owners of it to convey the goods of various merchants unconnected with each other, to the place of their destination. And the term is here used in contradistinction to a chartered ship, which is employed under a sealed instrument called a charter party. Abbot, 112, 215.

(*b*) Coggs v. Bernard, Ld. Raym. 918. 1 Ventr. 238. Jones on Bailm. 106. Abbot, 249. The responsibility of carriers by water stood on the same footing at common law as that of carriers by land: both being alike responsible for every damage, but that which accrued by the act of God or the king's enemies. Abbot, 223. Both, however, have succeeded in altering the situation

law to the same particular lien for the price of the carriage of goods delivered to

in which the common law had placed them; the latter by special notices, the legality of which seems now to be clearly established, ante note (*f*,) and the former by introducing clauses into the bills of lading to take away the responsibility of the masters and owners in various cases in which they would otherwise be responsible. (The right of doing which appears to be fully admitted, Nicholson v. Willan, 5 East, 507. Abbot, 218, 59, 62. Christian's notes to 3 Bla. Com. 165. note 7.) And by applications to the legislature, which has thought proper so far to accede to their wishes, as entirely to take away the liability of the owners in cases of damage by fire; 26 Geo. 3. c. 86. s. 2, and to limit it to the value of the ship and freight in case of embezzlement or robbery, 7 Geo. 2. c. 15. 26 Geo. 3. c. 86. s. 1; and to discharge both the *master* and owners from any responsibility for any gold and silver, diamonds, watches, jewels or precious stones, unless the shipper declare the true nature thereof to the master or owners by the bill of lading, or otherwise in writing, 26 Geo. 3. c. 86. s. 3; but except in this last case, the liability of the *master* remains the same as at common law, unless varied by a special contract, Abbot, 265. The justice of admitting common carriers to limit their responsibility, when the true value of the goods entrusted to them is concealed by the owner, is obvious, when it is considered that (except in the cases just mentioned) they are liable for unavoidable accidents, and that by requiring a declaration of the value of the goods, as the condition of their responsibility, they do not in fact decline the obligation which the law has imposed upon them, of carrying for *rea-*

them in the course of their trade; and the luggage of a passenger may be detained by the master of a vessel for his passage money. (*m*)

The right of retaining possession of the cargo, until the freight of the ship was discharged, appears to have been allowed to the master by most of the maritime codes of Europe. By the civil laws, as well as by those of Oleron, he is entitled to detain the cargo until payment is made of the freight and other charges, such as primage and average due in respect of it. The same privilege was given to him by the maritime ordinances of France. (*n*) According to our law whether the ship be a chartered or a general ship, the master is not (unless there be an express stipulation that he shall be,) bound to part with the possession of any part of his cargo, until the freight and other charges due in respect of such part are paid. (*o*) It has

sonable reward, but only secure themselves from being defrauded of a reward which is reasonable and adequate to the risk they incur; and when it is recollected too, that a carrier was never considered as liable to any greater extent than the value of the goods as represented to *him* by the bailor. Carth. 485.

(*m*) Wolf v. Summers, 2 Campb. 631.

(*n*) Abbot, 244.

(*o*) Abbot, 276. Anon. cases, 12 Mod. 447, 511. Artaza v. Smallpiece, 1 Esp. R. 23.

been holden too, that he may detain any part of the merchandize for the freight of all that is conveyed to the same person. (*p*) But where the time and manner of the payment of the freight are regulated by express stipulations in the charter party, (which is freq uently the case) the payment can only be enforced by proceeding on the charter party. (*q*) Nor can the master detain the goods *on board the ship* until these payments are made, as the merchant would then have no opportunity of examining their condition. (*r*) The usual practice in England is to send the goods to a wharf, and order the wharfinger not to part with them until the freight and other charges are paid, (*s*) which the master may do if he is doubtful of the payment, without losing his lien, as the possession of the wharfinger will, in such case, be considered the same as the master's. Or, if by the regulations of the revenue the goods are to be landed and put into the king's warehouse, if the duties are not paid, the master may, *it seems*, enter them in

(*p*) Soldergreen v. Flight, cited 6 East, 622. Abbot, 245.

(*q*) Abbot, 276.

(*r*) Abbot, 245. But see Artaza v. Smallpiece, 1 Esp. R. 23.

(*s*) Abbot, 246.

his own name, and thereby preserve his lien. (*t*)

But according to the principle by which all liens by the common law are regulated, if the master once voluntarily parts with the possession of the goods out of his own or his agent's hands, he loses his lien upon them, and cannot afterwards reclaim them. (*u*)

Lien of Dyer.

Though dyers, in common with other manufacturers, are not under any general obligation of law to receive the goods of

Dyers have a particular lien.

(*t*) Abbot, 276. I have said *it seems*, because Mr. Abbot gives us no authority upon this point; and in the case of Ward v. Felton, 1 East, 507. Ld. Kenyon doubted whether the captain parted with his lien on the goods for freight, by depositing them in the king's warehouse, pursuant to the regulations of the act of parliament.

(*u*) Anon. 12 Mod. 511. Artaza v. Smallpiece, 1 Esp. R. 23. Abbot, 246. In the case of Soldergreen v. Flight, Guildhall, sitt. after Trin. 1796, before Ld. Kenyon, Ch. J. cited Hanson v. Meyer, 6 East, 622. the captain of the ship was allowed a lien on a part of the cargo, which had been removed into a lighter alongside of the ship sent by the vendee, and which the captain afterwards fastened to the ship's side to prevent its final removal.

every one who may send them for the purpose of being dyed, (*a*) they have a particular lien upon all goods entrusted to them in the course of their trade, and may retain those goods for the work done upon them. But there is no usage of trade, which entitles them to retain such goods for any other demand against the owner, nor can they maintain a claim to a lien for a general balance accruing from work done in the course of their trade, unless there be an express agreement for it.(*b*)

But not a general lien;

Unless there be an express agreement for it.

(*a*) Collins v. Ongley cited Brennan v. Currint, Sayer's R. 224, Kirkman v. Shawcross, 6 T.R. 14. Oppenheim v. Russel, 3 Bos. & Pul. 42.

(*b*) Green v. Farmer, 4Burr. 2214. 1 Bla. R. 651. S. C. Close v. Waterhouse, 6 East. 523. in notis. In the cases of Mitford v. Vaughan, 6 East. 523. note e. and Rushforth v. Hadfield, 6 East. 523. it was said by the court, that since the case of Green v. Farmer, it had been established, that a dyer had a lien for his general balance. But the only cases which I can find subsequent to Green v. Farmer, which go to establish such a lien, are the two nisi prius decisions of Savill v. Barchard, E. 41 G. 3. A. D. 1801. 4 Esp. R. 53. and Humphreys v. Partridge, tried before Mr. J. Lawrence, at Gloucester summer assizes, 1803; cited Montague, B.L. Vol. 4, P. xviii. note (*a*). In the first of these cases strong evidence being given of the usage of trade in favour of such lien, Ld. Kenyon directed the jury, if they thought such was the general practice of trade, to find for the defendants, (who set up the lien as a de-

Where however the dyers, dressers, whitsters, printers and calenderers of Man-

fence in action of trover, for a quantity of baize sent them to dye,) and the jury thereupon found a verdict for them. In the second case the only point agitated was the right of a dyer to retain for his general balance; and nearly all the dyers in Gloucestershire, and some from other counties were examined, by whose evidence Mr. J. Lawrence said, he thought the custom was proved, and (Green v. Farmer, Burr. 2214. being cited on the other side,) observed that in several subsequent cases the custom had been established. And the dyers had a verdict. But in Close and another assignees of Riddel v. Waterhouse and others, 6 East. 523. note (*e*), which was trover for woollens delivered by the bankrupt before his bankruptcy, to the defendants, who were dyers at Halifax, to be dyed; and where a tender had been made of the price of dying the particular goods, but the defendants claimed to retain for their general balance for the expence of dying other goods on the ground of usage. The jury, at the trial before Rooke, J. at the York assizes, negatived any such usage at Halifax, and found a verdict for the plaintiffs: and on motion for a new trial, Tr. 42 G. 3. the court of K. B. finally discharged the rule, being of opinion that as the usage was negatived, the defendants could not retain for the price of dying any other than the particular goods dyed, or at most, only for the dying of such goods as were delivered to them at one and the same time, under one entire contract, and that at any rate, the circumstance of the defendants having had different parcels of goods in their hands at one time, which had been delivered at several times, did not give them a lien on the goods in question

chester and the neighbourhood, had published resolutions agreed upon among themselves at a public meeting, that they would not receive any more goods for the execution of the several purposes of their trades upon them, but on condition that they respectively should have a lien on such goods for their general balance: the court of King's Bench held this agreement to be good in law, because it was at the option of those who made it, to receive goods or not; and that any one, who after notice of it delivered goods to any of those manufacturers, must be taken to have assented to the terms of it, and consequently could not demand the goods so delivered, without first paying the balance of their general account.(c)

Lien of Factor or Broker.

FACTORS have always, it seems, been entitled to a particular lien upon the goods of their principal coming into their pos-

remaining in their hands, for the price of dying such other distinct parcels, as had been returned to the owner.

(c) Kirkman v. Shawcross, 6 T. R. 14. and see Clarke v. Gray, 4 Esp. R. 178.

session in the course of their trade, for the charges incident to those particular goods.(*d*) And since the case Kruger v. Wilcox, (*e*) Ambl. 252. A. D. 1755. their right to a general lien has been established upon the same principle, that general liens have been admitted in other cases by general usage of trade. And wherever there is a course of dealings, and a general account between the principal and factor, and a balance is due to the factor, he has a lien upon all goods of the principal in his hands, in the character of factor for such balance, without regard to the time when, or to the account upon which he received them.(*f*) He has this lien too, not only for money actually advanced to his principal, but also for a debt for which he is

(*d*) In common with other trades, ante, Chap. 2. a factor may detain goods to pay customs in any place, or for salvage, 2 Atk. 623. and see Wiseman v. Vandeput, 2 Vern. 203.

(*e*) It was doubtful before that case whether a factor could retain for the general balance of his account, per Ld. Mansfield, 4 Burr. 2218.

(*f*) Kruger v. Wilcox, Ambl. 252. Gardiner v. Coleman, S.C. cited 1 Burr. 494. Ex parte Emery, 2 Ves. 674. Godin v. London Assurance Company, 1 Burr. 494. Green v. Farmer, 4 Burr. 2214. Zinck v. Walker, 2 Bla. 1154. Hollingsworth v. Tooke, 2 H. Bla. 501. Walker v. Birch, 6 T. R. 262. and see 6 East. 25. in notis.

only a surety for him; and although he does not pay the debt until after the bankruptcy of the principal, provided the delivery of the property and his becoming surety took place before it. (*g*) For the lien attaches upon his becoming surety, which is the same thing as if he lent him the money.

The case, indeed, of a factor is that in which for the convenience of trade, from the nature of his employment, and with a view to encourage him to advance money upon goods in his possession, or which are to be consigned to him, (*h*) the right of lien appears to have been most favoured, and carried to the greatest extent. For it has been determined, that where a factor sells goods under a del credere commission, whereby he becomes responsible for the price, or where he is in advance for goods by actual payment, he has a lien on the price in the hands of the purchasers, though he has parted with possession of the goods; because though he has not the actual possession of the goods, yet as he has the power of giving a discharge or

(*g*) Drinkwater v. Goodwin, Cowp. 251. Hammonds v. Barclay, 2 East, 227.

(*h*) 3 Bos. & Pul. 488, 9.

bringing an action, he has a right to retain the money in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession. (*i*) Nor will this lien be defeated by proof that the factor knew at the time when he advanced the money to his principal, that the latter was in insolvent circumstances. (*k*)

And if a factor effect an insurance for his principal, and the principal be indebted to the factor on the balance of account, he may retain the policy, and has a lien upon it while it remains in his possession, and the balance remains unpaid. And where the consignor of a cargo of goods directs his factor to make an insurance upon it, and afterwards assigns both the cargo and the policy of insurance by an indorsement of the bill of lading, the assignee takes the policy subject to the lien of the factor for the general balance of his account with the consignor, and must pay that balance before he can oblige the factor to deliver up the policy. (*l*) And though the policy never come into the actual possession of the factor himself in such case, but remain

(*i*) Drinkwater v. Goodwin, Cowp. 251.

(*k*) Foxcroft v. Devonshire, 2 Burr. 931.

(*l*) Godin v. London Ass. Co. 1 Burr. 494.

in the hands of the broker who effected the insurance for the factor; the latter will still have a lien upon the money received upon the policy by the broker; who will be entitled to retain it against the assignee, as the servant of the factor; the possession of the broker being considered in effect the same as that of the factor. (*m*)

If the principal die before the consignment, on the faith of which the factor has advanced money, or accepted bills, come into the hands of the latter; and the executors of the principal, by any conduct of theirs, confirm the original destination of the goods, and the authority of the factor, he will be entitled to the same lien as if the principal had lived. Thus where a principal gave notice to a factor of an intended consignment of a ship to him, for the purpose of sale, and in consequence drew bills on him, which the factor accepted on the credit of the consignment; after which the principal died, but his executors directed the captain of the ship to follow his former orders, and wrote to the factor, communicating the death of the principal and their appointment as executors, ordering him at the same time to have the policy

(*m*) Man v. Shiffner, 2 East, 523.

on a part of the cargo cancelled; after which the ship arrived, and was delivered by the captain into the possession of the factor, who sold it: it was determined, that even if the death of the principal could be considered to operate as a revocation of the factor's authority, so as to prevent him from having a lien on the proceeds of the ship, yet the subsequent conduct of the executors was a sufficient affirmation of the factor's authority, and he was therefore entitled to a lien upon the proceeds, not only for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, but also for the amount of his outstanding acceptances not then due. (*n*)

When a factor has no lien.

1. But where a factor advanced money to his principal, who was a clothier, relying on the credit of cloths remaining in his hands to reimburse himself, and the clothier died, and upon his administrator suing at law for the cloth, the factor came into equity, and prayed he might be allowed an account of the monies he had advanced, it was refused: because if there were debts of an higher nature, it would have been a

(*n*) Hammonds v. Barclay, 2 East, 227.

devastavit in the administrator to pay the factor's debt. (o)

Where there is a special agreement.

2. Though it is a general rule of law, that a factor has a lien upon all goods consigned to him by his principal for sale; yet if goods are deposited with him for that purpose, and there be a special agreement between him and his principal, that he shall pay over the proceeds when the sale is effected, he will have no lien upon those goods, if not sold, for the balance of his general account accruing upon other articles: the express stipulation in this case preventing the application of the general rule of law. (p) And though a factor has a lien upon the proceeds of goods sold for his principal, where he is in actual advance to him, yet if he enters into a special agreement with his principal for a particular mode of payment, (q) or have notice of a special agreement between his principal and a third person as to the application of the money produced by the goods; he shall in neither of these cases be entitled to a lien on that money. Ac-

(o) Chapman v. Derby, 2 Vern. 117.

(p) Walker v. Birch, 6 T. R. 258.

(q) Per Ld. Eldon, Cowell v. Simpson, 16 Ves. jun. 280.

cordingly, where a factor made a general acceptance of a bill drawn upon him by his principal, payable out of the produce of goods in his hands after discharging prior acceptances, and upon the principal becoming bankrupt, the payee brought an action for money had and received against the factor: it was holden, that having accepted the bill generally, he could not refuse to pay it on account of the balance due to him; and that if he meant to reserve his own balance, he should have made a special acceptance. (*r*) So, too, where A. agreed to sell goods to B., to be accounted for by the latter in part as a satisfaction of a demand which he had upon the former, and C. with notice of this agreement undertook to sell the goods as factor; it was determined that he could not retain the produce for a general balance due to him from A. (*s*)

3. A factor has no lien on the goods of his principal for debts which accrued before his character of factor commenced. Accordingly, where a balance was due from a principal to his factor for goods sold by the latter in his own name to the former, before the relation of principal and factor

(*r*) Maber v. Massias, 2 Bla. R. 1072.

(*s*) Weymouth v. Boyer, 5 Ves. jun. 416.

existed between them, and on account of another employer, it was decided, that the factor could not on account of such balance retain goods which had been placed in his hands by the principal, since the relation of principal and factor commenced between them. (*t*)

4. A factor can acquire no lien on goods which have been consigned to him after the commission of an open(*u*) act of bankruptcy by the consignor, though the factor have advanced money on the credit of the consignment, the legal effect of such act being to enable the assignees to rescind all contracts made by the bankrupt after the commission of it, except in particular cases provided for by statutes, within the provisions of which this case is not comprehended. (*x*)

(*t*) Houghton v. Matthews, 3 Bos. & Pul. 485.

(*u*) According to the decision of Copland v. Stein, the factor could not acquire a lien upon goods consigned to him, even after the commission of a *secret* act of bankruptcy by the consignor; and as the law then stood, no contract made by a bankrupt after the act of bankruptcy, whether open or secret, was valid against the assignees, except in the three cases excepted by 1 Jac. 1. c. 15. s. 14. 21 Jac. 1. c. 19. s. 14. and 19 Geo. 2. c. 32. s. 1. But the law upon this subject is very materially altered by 46 Geo. 3. c. 135. s. 1. ante Chap. IV.

(*x*) Copland v. Stein, 8 T. R. 199.

5. According to the general rule of law with respect to liens where the goods of the principal do not come into the actual possession of the factor, he can acquire no lien upon them, even though he has accepted bills upon the faith of the consignment, and has paid part of the freight. (*y*) Thus in the case of Kinlock v. Craig, where the factor had accepted bills drawn on him by the principal, on the faith of consignments agreed to be made by the principal to the factor, and both of them became bankrupts before a cargo consigned came into the actual possession of the factor, who, after he had stopped payment, at first refused to accept the goods, but afterwards, and before he had committed any act of bankruptcy, paid part of the freight: it was determined that his assignees had no property in the cargo, and could not recover the produce of it from the assignees of the principal; they having sold it and received the purchase money.

6. As by the general rule of law that liens cannot exist without possession, the lien of a factor cannot attach on goods which do not come into his possession: so in conformity to the same rule, his lien

(*y*) Kinlock v. Craig, 3 T. R. 119, 783. 4 Bro. P. C. S. C.

cannot continue on the goods, so as to enable him to maintain trover for them at law, after he has parted with possession of them to his principal. (z)

(z) Kruger v. Wilcox, Ambl. 252. Godin v. London Ass. Co. Burr. 494. Per Buller, J. 6 East, 25, in notis. The decision of Lord Hardwicke in Snee v. Prescott, 1 Atk. 245, may appear to be at variance with this rule; but from the statement and explanation of that case given by Buller in Lickbarrow v. Mason, 6 East, 25 in notis, it appears to have turned chiefly upon the different notion entertained at that time as to what constituted a transfer of the property, rather than upon any difference of opinion with respect to the non-continuance of the common law lien, after the possession of the property had been once clearly relinquished. In equity, however, the goods may in some cases be followed, and a specific lien is allowed to remain on them for the charges which the factor has incurred in respect of them, after they have come into the possession of the principal; see Kruger v. Wilcox, Ambl. 252. Thus where a factor purchased goods for his principal, and paid the vendee for them, and sent them to his principal, and then drew a bill of exchange on the latter for the amount: which was sent back protested, (the principal having, after the receipt of the goods, become bankrupt,) it was holden to be a specific lien on the goods, and not suffered to go for other debts, until the price of them was paid. Exparte Emery, 2 Ves. 674.

Lien of Farrier.

As a farrier is from the nature of his employment (which is one of those, the exercise of which the law considers necessary to public convenience,) under a legal obligation to shoe the horse of any one who requires him so to do, if he has sufficient materials for the purpose, and an adequate reward is offered to him. (*a*) He is in recompence for this obligation entitled to a lien upon the horse for the price of his shoeing; and unless that price is tendered or paid, an action of trover will not lie against him for refusing to deliver the horse. (*b*)

Whether a farrier may detain a horse for the trouble and expence of curing it of any disorder and keeping it during the cure, has never been decided; but if the rule laid down in the cases exparte Deeze, and exparte Ockenden be law, that every

(*a*) 21 H. 6. 55, 56. Keilwood 50. Lane v. Cotton, 1 Ld. Raym. 654. S. C. 12 Mod. 484. 11 Mod. 16. 1 Salk. 18.

(*b*) Bac. Ab. Trover (E) p. 694. But see judgment of Lord Ellenborough, Rushforth v. Hadfield, 7 East, 229. Ld. Ellenborough appears, however, to be speaking only of general liens.

tradesman has a lien upon property entrusted to him in the course of his trade, for the trouble or expence he may have incurred in the execution of the purpose for which it was entrusted; it should seem, that a farrier is entitled to a lien, as well for the curing and keeping, as for the shoeing the horse. If, however, the farrier enter into a special agreement for the payment of a specific or a reasonable sum for the cure and keep of the horse, he certainly will have no lien upon it, such an agreement being a complete waiver of the right, if he was legally intitled to it. (*c*)

Lien of Fuller.

It has never been specifically (*d*) decided that fullers *in general* have any sort of lien. But it appears that by the particular custom of the city of Exeter, they have there a lien upon cloth delivered to them to be

(*c*) Brennan v. Currint, Say. 224. Selw. N. P. 1289. and see ante p. 47.

(*d*) According to the rule laid down ex parte Deeze, 1 Atk. 228. all tradesmen have a *particular* lien.

fulled, not only for the work done upon the same cloth, but for a general balance due from the owner in the course of trade. (*e*)

Lien of Innkeeper.

The common law of England having considered it necessary to public convenience, that every person who undertakes to keep a common inn, (*a*) should be under an obligation to receive and afford proper entertainment to every one who offers himself as a guest, (*b*) if there be

(e) Sweet v. Pym, 1 East, 4.

(a) A person who takes in lodgers to lodge and board in his house, and lets out stables, is not an innkeeper. Parkhurst v. Foster, 1 Salk. 387. But it is not necessary, to constitute a common inn, that there should be a sign before the door of the horse. Dalt. c. 7.

(b) Y. B. 5 Ed. 4. fol. 2. 22 Ed. 4. fol. 19. S. P. Keilw. 50. Lane v. Cotton, 12 Mod. 484. 1 Ld. Raym. 653. S. C. Yorke v. Grenaugh, Ld. Raym. 866. Salk. 388. S. C. Kirkman v. Shawcross, 6 T. R. 14. Naylor v. Mangles, 1 Esp. R. 109. Fortescue de Laud. 82. in notis. 3 Bla. Com. 165. Bul. N. P. 45. If one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to provide him with victuals and lodging upon his tendering him a reasonable price for the same, he is not only liable to an

sufficient room for him in the inn, (*c*) and no good reason for refusing him; (*d*) has in compensation (*e*) for the burden which

action on the case at the suit of the party grieved, but may also be indicted and fined at the suit of the king. 1 Hawk. 225. It is said too, that he may be compelled by the constable of the town, or by a justice of the peace to receive and entertain such person. Dalt. c. 7. Burn's Justice, tit. Alehouses, and see Y. B. 5 Ed. 4. fol. 2.

(*c*) 1 Ld. Raym. 654. Bennett v. Mellor, 5 T.R. 275.

(*d*) 1 Ventr. 333. 3 Bla. Com. 165.

(*e*) Yorke v. Grenaugh, Ld. Raym. 866. Naylor v. Mangles, 1 Esp. R. 109. Other reasons have been assigned as the ground of the innkeeper's lien by the common law. In the case of Jones v. Thurlow, 8 Mod. 172. the court said this custom was founded on the hardship of the innkeeper's case to sue for every little debt, or the greater hardship that he may not know where to find him that was his guest after he is gone. In Bac. Ab. tit. Inns, the reason given for the innkeeper's power of detaining without a special agreement for that purpose is, that men who get their livelihood by the entertainment of others, cannot annex such a disobliging condition that they shall retain the party's property in case of nonpayment, nor make so disadvantageous and imprudent a supposition, as that they shall not be paid. But the reason given by Ld. Holt in the case of Yorke v. Grenaugh, and by Ld. Kenyon in Naylor v. Mangles, and which I have adopted in the text, appears to be the only true and original foundation of the innkeeper's lien. For there would be no great hardship in being obliged to rely on the credit of his guest, if he was not likewise obliged to receive and entertain him.

it has thus imposed, allowed the innkeeper the privilege of detaining the person of the guest himself, (*f*) and, it seems, his goods, (*g*) until he has discharged the expence of his own lodging and food, and his horse, until he has paid for its provender and stabling. (*h*) And the mere act of leaving the horse in the stable of the inn is sufficient to constitute the person leaving it a guest; because the innkeeper derives a profit from the meat consumed by the horse. (*i*) And it is not necessary in order to entitle the innkeeper to exercise this right of detainer, that he should make

(*f*) Fortescue de Laud. p. 82. Bac. Ab. tit. Inns. Burn's Just. tit. Alehouses.

(*g*) Fortescue de Laud. 82. n. b. Hawk. P. C. B. 1. c. 78. s. 8. c. 80. s. 6. Cro. Jac. 609. Yorke v. Grindstone, 1 Salk. 388. Wood C. L. 529. Dalt. p. 3. and see 11 & 12 W. 3. c. 15. s. 2. I have said *it seems*, because there are some authorities to the contrary, see 1 Bulst. 207. Bac. Ab. tit. Inns. Burn's Just. title Alehouses. The weight of authority appears, however, to be clearly on the affirmative side; and from the words of the statute 11 and 12 W. 3. c. 15. s. 2. the legislature seems to have been of that opinion.

(*h*) Y.B. 5 Ed. 4. fol. 2. Yelv. 67. and see Robinson v. Walter, 3 Bulstr. 268. Yorke v. Grenaugh, Ld. Raym. 866. Jones v. Thurlow, 8 Mod. 172. Exparte Ockenden, 1 Atk. 236. Fortescue de Laud. p. 82. note (b.) Bul. N. P. 48.

(*i*) Lane v. Cotton, 12 Mod. 484. Yorke v. Grindstone, 1 Salk. 388. Holt, C. J. dissentiente.

a previous demand of payment. (*k*) Nor will the want of title in the guest deprive the innkeeper of his lien upon the horse; for the obvious reason that he is obliged to receive it from the guest without enquiring into his title. And, therefore, though it should be proved to have been stolen by the person who left it, the innkeeper will still be entitled to retain it against the real owner, until its keep is paid for. (*l*)

But the lien to which the innkeeper is thus entitled by the common law, is only a *particular* lien upon the thing itself in respect of which the debt is incurred; and, therefore, an horse committed to an innkeeper can be detained only for its own meat, and not for a debt previously incurred by the owner for the meat of any other horse. The chattels in such case being in the custody of the law for the debt which arises from the thing itself, and not for any other debt due from the same party; for the law is open for all such debts, and does not permit private persons to make reprisals. (*m*)

(*k*) Yorke v. Grenaugh, Ld. Raym. 867, Salk. 388. S. C.

(*l*) Ante note (*k*).

(*m*) 1 Bulstr. 207. Bac. Ab. tit. Inns. Burn's Just. title Alehouses.

And if the innkeeper, waiving the privilege which the law allows him, give the guest credit, and suffer him and his horse to depart without payment, he can never afterwards detain either guest or horse on the same account, and will have no other remedy but his action at law. (*n*) Or, if the innkeeper make a special agreement with the guest for payment, it will be considered as a waiver of his lien, and his only remedy will be to sue upon the agreement. (*o*)

If the owner neglects or refuses to redeem a horse detained, the innkeeper cannot sell (*p*) or use (*q*) it (though it should have consumed double its value) by the general custom of the realm. But by the particular customs of London and Exeter, when such

(*n*) Jones v. Thurlow, 8 Mod. 172. Warbrook v. Griffin, 2 Brownl. 254. Jones v. Pearle, 1 Str. 557. Per Buller, J. Lickbarrow v. Mason, 6 East, 25. in notis.

(*o*) Y. B. 5 Ed. fol. 2. Yelv. 67.

(*p*) Jones v. Thurlow, 8 Mod. 172. Jones v. Pearle, 1 Str. 556. Sel. Ca. 125. This point seems to be decided by the case of Jones v. Pearle, but the contrary was formerly holden to be law; see Case de Hoteler, Yelv. 67. Where it was laid down by Popham, Ch. J. and agreed to by the whole court, that the horse might be sold when he had eat out his value upon a reasonable appraisement, if there was no special agreement.

(*q*) Bac. Ab. title Inns. Burn's Just. tit. Alehouses.

horse has eat out its price, the innkeeper may upon the reasonable appraisement of four of his neighbours sell it, or take it as his own. (*r*)

The same regard to the proper accommodation of travellers which gave rise to the obligations under which innkeepers are placed by the common law, partly induced the legislature in some measure to restrict the lien, which that law has given them, by 11 & 12 W. 3. c. 15. s. 2. by which it is enacted, "that if any innkeeper or alehousekeeper shall sell any ale or beer in any vessel not signed, stamped, or marked according to the provisions of the preceding section of that act, to any traveller or other person, or if in giving any account or reckoning in writing, or otherwise, such innkeeper or alehousekeeper shall refuse to give in the particular number of quarts or pints of ale or beer for which the demand is made on such account: it shall not be lawful for any such innkeeper or alehousekeeper for default of payment of such reckoning to detain any goods, or other things belonging to the person from whom such reckoning shall be due,

(*r*) Moss v. Townshend, 3 Bulstr. 271. Bac. Abr. tit. Inns.

"but he shall be left to his action at law "for the same, any custom or usage for "the same to the contrary in any wise "notwithstanding."

Lien of Insurance Broker.

Insurance brokers have a lien upon the policies of their employers in their hands, and upon the money received by them upon those policies, not only for the amount of their commission and the premiums of the policies themselves, but also for a general balance due from their employers. (*a*)

And if the possession of the policy be relinquished to the principal, and again obtained from him by the broker under pretence of receiving the money from the underwriters, but really with a view to hold it as a security, his lien upon it will revive, though the loss be not adjusted by him, until after the bankruptcy of his employer; provided the possession of it be regained before that event has taken place. (*g*) He will also be entitled to the

(*a*) Whitehead v. Vaughan, Co. B. L. 566. Parker v. Carter, Co. B. L. 567.

(*b*) Whitehead v. Vaughan, Co. B. L. 566.

same lien upon the money received upon an insurance effected by order of his principal before the bankruptcy of the latter, though the loss do not happen until after it. (*c*)

But if an agent employ an insurance broker to effect an insurance for his principal, and the broker know that it is for the principal, he can upon the bankruptcy of the agent have a lien upon the policy in his hands only for the amount of the premium and commission upon the same, and not for a general balance due to him from the agent; (*d*) though a larger balance is due from the principal to the agent, and the former has not paid the latter any thing for getting the policy effected. (*e*) And if an agent, without naming his principal, effect an insurance in his own name with his usual broker, but inform the broker that the property is neutral, and warranted to be so, such information will be sufficient notice to the broker, that the insurance is not on account of the agent, to deprive the former upon bankruptcy of the agent of any lien upon

(*c*) Parker v. Carter, Co. B. L. 567.

(*d*) Maans v. Henderson, 1 East, 335. Man v. Shiffner, 2 East, 523.

(*e*) Snook v. Davidson, 2 Camp. R. 218.

the policy for a general balance due from such agent. (*f*)

These cases, it should be observed, deprives the broker of his general lien for a balance due from the agent only, where he is aware, that the party with whom he contracts acts merely as the agent of a third person. But the case of Lanyon v. Blanchard, 2 Camp. R. 597. goes still further, and deprives the broker of his general lien, though he is ignorant of the relation in which the agent stands, and contracts with him as a principal. In that case where an agent employed to effect an insurance on goods represented himself to the insurance broker, who effected the insurance for him, as the owner of the goods. It was determined, that the insurance broker could not retain the policy against the principal for a general balance due from the agent. (*g*)

(*f*) Maans v. Henderson, 1 East, 335.

(*g*) According to the principle of George v. Clagget, 7 T. R. 359, if the agent act under a del credere commission, and direct policies to be effected as for himself, the broker would be entitled to retain the policy in his hands, or any money received from the underwriters upon it for the general balance due to him from the agent. The decision of Rabone v. Williams, cited 7 T.R.360. carries this principle still further; for it does not appear that the factor in that case acted under a del credere commission; and Lord Mansfield

Lien of Miller.

A miller has a particular lien upon the corn of his employer in his hands, which

said, that where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. In the case of Weldon v. Gould, 3 Esp. R. 268., it was decided by Ld. Kenyon, Ch. J. upon the same principle, that where goods were intrusted by the owner to another person in order to have them printed, and that person delivered them to a calico printer *as his own* for that purpose, the calico printer might retain them against the owner for a general balance due from the person who delivered them. Upon the principle laid down in these cases, it seems that a broker should have a lien upon a policy which he has effected for an agent who conceals his principal, for a general balance due from that agent. The case, however, of Lanyon v. Blanchard, 2 Campb. R. 597. seems to contravene this doctrine. But the decisions of Richardson v. Goss, 3 Bos. & Pul. 119, and Pulteney v. Keymer, 3 Esp. 182. only qualify it, and admit that where money has been advanced to, or bills have been accepted for, an agent, on the credit of a delivery or consignment of his principal's property, the person to whom such delivery or consignment is made, will have a lien to the amount of the money so ad-

entitles him to retain it for the price of grinding the same. But he has no lien upon it for a general balance due to him from his employer, for the price of grinding other corn. Accordingly, where a flour factor employed a miller, and the latter, having always a large quantity of corn and a great number of sacks belonging to the flour factor in his hands, trusted the flour factor to so large an amount, that when he became a bankrupt, he owed the miller two hundred and eighty-six pounds for grinding done before, and sixteen for grinding corn then in hand. The miller insisted that he had a lien upon the corn and sacks for the whole debt; but Lord Hardwicke held, that the miller having given no evidence of a contract for a specific lien, nor for a lien arising by the general usage of trade, could retain only for the price of grinding the corn then in his hands. (*e*)

vanced, or bills accepted, against the principal, if that person was ignorant, at the time of the delivery or consignment, that the property belonged to the principal, and the delivery or consignment was not tortious against the latter.

(*e*) Exparte Ockenden, 1 Atk. 235. and see 1 Bla. R. 653.

Lien of Packer.

A packer has a lien on goods in his hands not only for the price of packing them, but, being in the nature of a factor, is also by the usage of trade entitled to a lien on them for a general balance due to him from his employer. (*f*) This was decided in the case exparte Deeze, where a clothier having borrowed money, on a note of hand from a packer, *but at a time when he had no dealings with him in his trade of packing*, afterwards sent him in cloth to pack, and proof being adduced that it was the usage for packers to lend money to clothiers; and that the cloths left to be packed were considered as a pledge not only for the packing *but for the loan of money likewise:* it was holden, that the packer might retain the cloth for the money lent as well as for the price of packing.

Lien of Pawnee.

All liens which are created by a deposit

(*f*) Exparte Deeze, 1 Atk. 228. and see Green v. Farmer, 1 Bla. R. 651. 4 Bur. 2222. Savill v. Barchard, 4 Esp. 53. S. P. and ante, Chap. III. [illegible]. P 32

of personal property by one person in the hands of another, (*a*) under an express or implied stipulation, that the latter shall be entitled to retain it for his security, until

(*a*) Where goods are left by the owner under an agreement with his creditor in the hands of a third person, as a security to the creditor, it seems that such third person, though otherwise unconnected with the creditor, may be so far considered as his servant for keeping possession of the goods, as to render the transaction a sufficient pledge of them to the creditor. Thus in Falkener v. Case, 2 T. R. 491, where the owner of a ship assigned it, together with a policy of insurance upon it to his creditor; but the broker in whose hands the policy was, refusing to deliver it up on the ground of a lien, it was agreed between the owner and the creditor, that it should remain in the broker's hands as a security to the creditor: the Lord Chancellor said, "there seems to me to be no difference between cases where effects which have been in the possession of the pawnor are pledged, and cases where goods that he has a property in are left in the hands of a third person: I consider them equally as pledges." And exparte Coming, 9 Ves. jun. 115; the Lord Chancellor observes, "no case has gone the length, though I do not see the reason, that if the deposit is in the hands of a person who could fairly be called a third person abstracted from both, that can be considered as a deposit for the creditor, provided that is proved to be the intention." But it should be observed, that the case of Falkener v. Case was a case of a mortgage rather than of a pawn, and delivery is said to be the essence of an English pawn. See Ryall v. Rowles, 1 Atk. 167, and see Wilson v. Balfour, 2 Campb. 579.

some debt due to him from the former is discharged, are in the nature of pawns or pledges; whether the deposit were made for the execution of some purpose on the goods in the course of trade, or for bare custody. But as the term pawn, as generally used and understood, applies only where goods are deposited for the latter purpose; and as those liens which arise from deposits for the former purpose are separately considered under the different characters to which they belong; the only kind of lien which will be noticed under this head, is that which is created by a delivery of goods for bare custody, to be restored to the depositor, as soon as the debt for which it is a security is paid. And as the distinction between mortgages and pawns does not appear to have been always sufficiently understood or attended to, it may not be improper, previous to entering into the consideration of the lien created by the latter, to explain what that distinction really is. A very ample statement of that distinction is given by Lord Hardwicke in the case of Ryall v. Rowles, 1 Atk. 167: the substance of which is, that a mortgage is a conditional sale, by which the general legal property in the thing mortgaged is conveyed to the mort-

gagee, (*b*) subject to the mortgagor's power of redemption. But by a pawn the pawnee acquires only a special property in the thing pawned, to detain it for his security, until it is redeemed, the general property still remaining in the pawnor.

Having given this explanation of the different nature of mortgages and pawns, I now proceed to the consideration of the lien which the pawnee acquires.

In the case of pawns a lien is created by the transaction itself, and may be claimed to any extent to which the agreement by which the pledge is effected, declares it shall extend; whether it be for money lent previously to or at the time of the deposit, or for sums to be advanced subsequently to it. (*c*) But how far a subject which is

(*b*) Though in equity only a lien is obtained by the mortgage, as long as the power of redemption remains, at law, the right of property is transferred, and therefore no lien can exist; for a right of lien necessarily supposes the property to be in some other person, and it is a contradiction in terms, to say a man has a lien upon his own property. Per Buller, J. Lickbarrow v. Mason, 6 East 25, in notis.

(*c*) It seems that the acceptor of a bill of exchange may retain money and effects of the drawer in his hands to discharge it, either until the bill is delivered up to him, or until he receives a bond of indemnity against being sued upon it. See Hammonds v. Barclay, 2 East,

pledged as a security for a debt already due, shall be considered as a security for further loans, *where there is no express agreement to that effect*, must, from the nature of the thing, depend upon the circumstances of each particular case. If it can be presumed from these, that the ground and inducement upon which the pawnee advanced the further loans was his having a pledge in his hands, a court of equity will not suffer the pledge to be redeemed without payment of all the sums advanced. (*d*) So where a testator had borrowed a sum of money upon a pawn of jewels, and afterwards borrowed three other several sums of the pawnee, for each of which he gave his note without taking any notice of the jewels, it was determined in the court of Chancery, that the borrower's executors should not redeem the jewels without

227. Madden v. Kempster, 1 Campb. 12. But it remains unsettled, whether if the drawer, the payee, and the acceptor of a bill of exchange become bankrupts, after the bill is negociated, and the payee be in possession of property of the drawers, who, in the event of the bill being proved against the estate of the payee, will be indebted to the payee; the assignees under the commission against the payee, will have any lien arising from the possibility of such debt. Walker v. Birch, 6 T. R. 258.

(*d*) Exparte Ockenden, 1 Atk. 236.

first paying the money due upon the notes, because it was presumed, from the money being lent subsequent to the deposit of the pledge, (which excluded the presumption of any trust to the person,) that the pawnee lent the whole of the money on the credit of the pledge in his hand. (*e*)

But if the circumstances of the case do not warrant such a presumption, the pawnee will then only be allowed to retain for the debt for which the pledge was expressly made. (*f*) Nor is it a general rule either at law or equity, that where a man having a security from another for a loan already made to him, advances more money to the same person, that person shall either pay the lender the whole debt, or not redeem at all. And if any transaction takes place between the pawnor and pawnee, by which the latter acknowledges that he has only possession of the security for one sum, he shall not afterwards be allowed to claim a lien upon it in respect of another. Thus where personal securities were pledged for a specific debt, and afterwards a mortgage was made by the pawnor to the pawnee, of an estate, no notice being taken

(*e*) Demainbray v. Metcalf, Prec. in Cha. 419. 2 Vern. 691, 8. S. C.

(*f*) Exparte Ockenden, 1 Atk. 236.

at the time of the debt for which the personal securities were pledged, and some time subsequent to the mortgage the same securities together with others were pledged to the pawnee for the balance of an account due to him from the pawnor, no notice being taken of the mortgage, redemption of the personal securities was decreed, without compelling the discharge of what was due on the mortgage, because there appeared to have been no intention of tacking the securities to the mortgage, at the time the latter was made; and if such an intention really existed, it was waived by the subsequent pledge of the securities without noticing the mortgage, and the transactions were entirely distinct. (*g*) Upon the same principle, where a banker being in advance to his employer to the amount of fourteen hundred pounds, afterwards received from the latter securities as a pledge for one thousand only, it was determined that the banker had no lien upon them for more than the thousand pounds. (*h*)

(*g*) Jones v. Smith, 2 Ves. jun. 372. The decree in this case was afterwards reversed in the House of Lords, but it is not stated upon what ground, see 6 Ves. jun. 229, note (d).

(*h*) Vanderzee v. Willis, 3 Bro. C. C. 21. But see Adams v. Clayton, 6 Ves. jun. 226, where the Master

1. According to the general rule of law with respect to liens, no lien can be acquired by a pawnee, where the deposit of the property is made by the pawnor after the commission of an open (*i*) act of bankruptcy, or with intent to give the pawnee a frau-

of the Rolls says, "in Vanderzee v. Willis there was an assignment of bonds to secure 1000l. borrowed by the testator from his bankers; at that time he was indebted to them in more, and he continued indebted to them in more to his death. His executrix filed a bill to redeem; the bankers insisted upon a right to tack, *and so standing the case I think they must have been paid the whole.* But it was insisted, that a bill had been filed by *creditors*, and a decree made. Lord Thurlow seems to have holden, that it would have made it a question with *creditors* and not with the executrix simply; stating the principle, that where the equity has passed to the assignee, you cannot insist upon retaining against the assignee." And upon this principle in the case of Clayton v. Adams, where a testator had conveyed all his estate to one creditor in trust for the benefit of all, and assigned a policy of insurance on his life to the trustee as a security for 1000l. advanced by him to the testator, who upon the death of the testator received the money from the insurance office, and claimed to retain the surplus that remained after reimbursing himself the 1000l. for money due upon a subsequent promissory note, the Master of the Rolls decided, that he was not entitled so to do against the other creditors.

(*i*) If the act be secret the transaction is not void unless it takes place within two calendar months of the date of the commission. 46 Geo. 3. c. 135. s. 1.

dulent preference in the event of his bankruptcy. (*k*)

2. Where the goods are pawned upon an usurious loan, no lien can be acquired by the pawnee for more than what is fairly due to him, the pawnor being allowed in such case to recover them in an action of trover upon tendering that sum; (*l*) for where contracts are prohibited by positive statute for the sake of protecting one set of men from another, the party injured by the contract is not considered as standing in pari delicto; and in furtherance of the statute is allowed, after the transaction is completed, to bring his action, and defeat the contract, where money has been paid upon it, by an action for money had and received, and where goods deposited, by an action of trover. (*m*) But as these are equitable actions, before the party can entitle himself to recover upon them he must pay or tender the other party what is really due to him. And it has accordingly

(*k*) Wilson v. Balfour, 2 Campb. R. 579. Tamplin v. Diggens, 2 Campb. 312; and see ante, Chap. IV.

(*l*) Astley v. Reynolds, 2 Str. 915. Fitzroy v. Gwillim, 1 T. R. 153.

(*m*) Moses v. Macferlan, 2 Burr. 1011. Dale v. Tollet, 4 Burr. 2133. Clarke v. Shee, Cowp. 200. Smith v. Bromley, Doug. 696. Lowry v. Bourdieu, Doug. 467.

been decided, that though the loan be usurious, the pawnor cannot recover the goods pawned in trover, without first tendering the sum really advanced. (*n*) And in conformity to the principle (*o*) of the cases in which the recovery of money paid upon usurious contracts has been sought by actions for money had and received, and in which only the surplus beyond the legal interest has ever been allowed to be recovered, legal interest should also be tendered to the pawnee in an action for trover for goods pawned upon an usurious loan. (*p*)

3. Neither can the pawnee acquire any lien upon goods (*q*) pawned without the

(*n*) Fitzroy v. Gwillim, 1 T. R. 153.

(*o*) That the plaintiff shall only be allowed to recover so much as the defendant is not entitled in conscience to retain.

(*p*) See cases ante note (*m*).

(*q*) Excepting pledges of such goods as are placed upon the same footing as money, as bank notes, notes payable to bearer, and bills of exchange indorsed, and other securities, the legal interest in which by the law merchant passes by indorsement and delivery, and which if passed to a bona fide holder for a valuable consideration without notice, cannot be recovered by the original owner. Salk. 126. Miller v. Race, 1 Burr. 452. Grant v. Vaughan, 3 Burr. 1516. 1 Bla. R. 485. Peacock v. Rhodes, Doug. 682. Solo-

authority of the owner, though the want of title in the pawnor was unknown to the pawnee at the time he received the pledge. (r) For it is a principle of the law of England as well as of the civil law, that where a person is acting ex mandato, those dealing with him must enquire into the extent of his authority. (s) Accord-

mons v. Bank of England, 13 East, 135.n.a. Lowndes v. Anderson, 13 East, 130. King v. Milsom, 2 Camph. 5. India bonds too, which before the statute 52 Geo.3. c. 64. were not upon this footing, see Glyn v. Baker, 13 East, 509. are by that statute made assignable and transferrable by delivery of possession.

(r) Marsden v. Panshall, 1 Vern. 407. Daubigny v. Duval, 5 T. R. 604. De Bouchout v. Goldsmid, 5 Ves. jun. 211. Maans v. Henderson, 1 East, 337. Vin. Ab. tit. Pawn. (E.) Where chattels are pledged by a person who is not the owner, but a mere bailee, though the pawnee supposes the pawnor to be the true owner, and has no reason to think otherwise; a court of equity will oblige the pawnee, if he admits the title of the true owner, and only claims the value for which the chattels were pledged, to make such a discovery and give such a description of the property, as will enable the true owner to bring an action at law for it. Strode v. Blackburne, 3 Ves. jun. 222.

(s) De Bouchout v. Goldsmid, 5 Ves. jun. 211. and see judgment of Lawrence, J. Newsom v. Thornton, 6 East, 17. Upon this principle a transfer by an executor of the assets of the testator by way of pledge immediately after the death of the latter, to secure a debt of the executor, and future advances to be made

ingly where a factor or broker pawns the goods of his principal, the pawnee cannot retain them against the principal for the money advanced upon them, (*t*) though he was ignorant at the time of the pledge of the relation in which the pawnor stood to his principal, and contracted with him as the owner of the goods; (*u*) and though there is the formality of a bill of parcels and receipt; (*x*) nor will the pawnee acquire a lien against the principal, where the factor or broker makes the pledge of the goods by indorsement, and delivery of the bill of lading, (*y*) or by transferring

to him, may be set aside in equity by the general legatees, where the creditor to whom the pledge is made, is guilty of gross negligence in not enquiring into the authority of the executor to dispose of the assets in that way; though it do not appear, that he was aware of that want of authority. Hill v. Simpson, 7 Ves. jun. 152. Taylor v. Hawkins, 8 Ves. jun. 209. and a pecuniary or residuary legatee may have such a pledge set aside, though it be only for money advanced at the time to the executor, if it appears, from the circumstances of the case, that the pawnee had knowledge of an intended application of the money not conformable to or connected with the character of executor. Macleod v. Drummond, 14 Ves. jun. 353. 17 Ves. jun, 152.

(*t*) Cases cited ante note (*r*.)

(*u*) M'Combie v. Davies, 6 East, 538.

(*x*) Paterson v. Tash, 2 Str. 1178.

(*y*) Newsom v. Thornton, 6 East, 17. 2 Smith's R. 207. S. C.

the goods to the pawnee's name, where they are in the king's warehouse, (*z*) any more than where the factor or broker makes it by delivery of the goods themselves to the pawnee. (*a*)

In conformity to the same general rule, where goods are stolen and pawned, the owner may maintain trover against the

(*z*) M'Combie v. Davies, 6 East, 538. 2 Smith's R. 557. S. C.

(*a*) But a banker in London to whom bills are paid by a customer who keeps his accounts with him, may pledge them to a third person as a security for money to be advanced to the banker, though the banker at the time of the pledge was indebted in a considerable balance to his customer; provided that circumstance was unknown to the pawnee. Collins v. Martin, 2 Esp. R. 520. And where a principal seeks to recover the value of his goods, which have been pledged by his factor in an action of trover, though no tender to the pawnee is necessary; yet if the factor is in advance to the principal, it seems that the latter must tender to the former what is due to him, before he can recover in such action from the pawnee. Daubigny v. Duval, 5 T. R. 604. where the pawnor has only a limited estate or interest in a thing, he cannot give a greater estate or interest to the pawnee by pledging it to him. And therefore, where a tenant for life of plate pawned it to a pawn-broker, and died; it was adjudged, that though the pawnbroker had no notice of the limited nature of the pawnor's interest in the plate, he could have no lien upon it against the remainderman. Hoare v. Parker, 2 T. R. 376. and see exparte Nesbitt, 2 Scho. and Lef. R. 279. acc.

pawnbroker, though the latter was ignorant of their being stolen. (*b*) Or if goods are placed by the owner in the hands of another for the purpose of safe custody, and pawned by the latter to a third person, the pawnee cannot retain them against the owner. (*c*) Or if the finder of goods pledge them the owner may retake them. (*d*)

But though no lien can be acquired upon goods pawned without the authority of him who has the general property in them, even though the pawnee is not

(*b*) Though goods stolen and *sold* in market overt cannot be recovered from the purchaser, except under 21 H. 8, c.11. where the owner prosecutes the felon to conviction. Horwood v. Smith,2 T.R. 750. There is no market overt for *pawning*. See Hoare v. Hartopp, 3 Atk. 44. and Packer v. Gillies, Guildhall sitt. after Trin. Term 1806, cited 2 Campb. R. 336. n. in which case trover being brought against a pawnbroker for goods pledged with him which had been stolen from the house of the plaintiff, and pawned by a woman who was tried for the felony, but acquitted on the absence of a material witness; Ld. Ellenborough held, that the action well lay against the pawnee, and the plaintiff had a verdict. N. B. It is provided by stat. 1 Jac.1. c. 21. that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property.

(*c*) Hoare v. Hartopp, 3 Atk. 44.

(*d*) Bro. Pledges, 28. Vin. Ab. tit. Pawn. (E.)

aware of the pawnor's want of authority to dispose of them in that manner, yet where goods are obtained under false pretences, and pawned without notice of the fraud to the pawnbroker, and on the conviction of the offender, the original owner get possession of his goods again; the pawnbroker may maintain trover against him to recover them back.(*e*)

When lien of pawnee is transferable.

5. The pawnee has such an interest in the pawn that he may assign it over (*f*) to a third person, and the assignee will be subject to an action of detinue, if he detains it after payment or tender of the money by the owner.(*g*) And where the pawnee of goods pawned them over to another for a larger sum than that for which the owner pledged them to him, and afterwards borrowed more money on promissory notes of the second pawnee, the court of Chancery would not suffer the owner to redeem from the second pawnee, without paying him the whole of the money which he has advanced upon the goods and the promissory notes.(*h*)

(*e*) Parker v. Patrick, 5 T. R. 175.

(*f*) Moor v. Benham, Owen 124. Demainbray v. Metcalf, 2 Vern. 691, 698. S. C. Mason v. Lickbarrow, 1 H. Bla. 360. Yelv. 178. Contr.

(*g*) Yelv. 178. Cro. Jac. 244.

(*h*) Demainbray v. Metcalf, 2 Vern. 691. The re-

6. Upon tender of the money advanced upon the pawn, by the pawnor or his executor, the lien of the pawnee is immediately divested; and the property, notwithstanding his refusal to part with it, is instantly reduced to the pawnor or his executor; and they may bring trover for it.(*i*) But the pawnee will not lose the When divested.

porter adds a quære to the decision, and it seems to be at variance with those of Hoare v. Parker, 2 T. R. 376. and Marsden v. Panshull, 1 Vern. 407. and others; the principle of which is, that the pawnor cannot create a greater interest in the thing pawned than he himself possesses. It seems likewise to be at variance with the rule laid down in Ratcliff v. Davis, Yelv. 178. that where the pawnee has delivered over the pledge to a third person, even on consideration, a tender need not be made by the owner to the latter. According however to the report of Demainbray v. Metcalf, in Prec. in Chanc. 419. the day limited for redemption by the owner of the jewels, from the first pawnee, *was elapsed*, and the jewels had become at law the absolute property of the latter: when the former applied to equity to be allowed to redeem, which it appears may be done, as well in the case of a personal pledge as of a mortgage. And if this statement be correct, the owner having lost his legal, and having only an equitable right to redeem, the conditions annexed to this redemption in equity (by which an injury to a third party is prevented) will not appear unreasonable.

(*i*) Vin. Ab. tit. Pawn (E.) 2 Salk. 522. 1 Bulstr. 29. 1 Rol. R. 129. In the case of Ratcliffe v. Davies, Yelv. 178. Cro. Jac. 244. it was held by the majority

benefit of his lien by an execution upon the goods of the pawnor for a debt recovered from him, subsequent to the act of pawning. So if a man deliver goods in pledge for a loan of forty pounds, and a sum to that amount is afterwards recovered from him in an action of debt by another person: those goods shall not be put in execution until the forty pounds are paid.(*k*)

Nor shall the pawnee be deprived of his lien on the goods pawned, by the pawnor's being afterwards attainted of felony; and the king shall not in that case have the goods without first paying the sum for which they were pledged.(*l*) But the king may, if he chuse, redeem them by paying the money. (*m*)

Lien of Taylor.

A taylor has by the common law, a particular lien upon a coat or other garment

of the court that the pawnor might redeem from the executrix of the pawnee, but that the executor of the pawnor could not redeem.

(*k*) Vin. Ab. Tit. Pawn. (A.) 3.

(*l*) Bro. Pledges, pl. 31. Vin. Ab. Tit. Pawn. (A.) 1 Bulstr. 29.

(*m*) Yelv. 178.

for the price of making it, and is not liable to an action of trover for refusing to deliver it up to the person from whom he received the materials, unless the price has been either paid or tendered.(*a*) But he has no power to sell the garment upon default of payment. (*b*)

Lien of Vendor.

A vendor of property has by the common law, a lien upon it as long as it continues in his possession, and the vendee neglects to pay or tender the price agreed upon for it. For though the general property in the thing sold is vested in the vendee by the sale, a lien or special property, which will be a good defence in an action of trover, remains in the vendor.(*c*) Unless indeed it appears from

(*a*) Y. B. 5 Ed. 4. fol. 2. Yelv. 67. Cooper v. Andrews, Hob. 42. Chapman v. Allen, Cro. Car. 271. Hussey v. Christie, 9 East. 433. 6 Bac. Ab. 694.

(*b*) Yelv. 67.

(*c*) Y. B. 5 Ed. 4. fol. 2. S. P. 22 E . 4. fol. 49. Hob. 41. Mason v. Lickbarrow, 1 H. Bla. 363. 2 Bla. Com. 448. A part payment, it seems, would not divest the lien, see Hodgson v. Loy. 7 T. R. 440. Feize v. Wray, 3 East. 93. In Noy's Maxims, 88. recognized by Ld. Ellenborough, Ch. J. in Hinde v. White-

the conditions of the sale, that the vendor relied solely upon the personal credit of the vendee, in which case he cannot have recourse to the right of retainer, as where the day of payment is by agreement postponed to a future day. The vendee may obtain possession of the thing sold immediately by an action of trover or detinue,

house, 7 East. 571. It is said, if I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. *And if the horse die in my stable, between the bargain and delivery*, I may have an action of debt for my money, *because by the bargain money property the bargain was in the buyer.* It seems, from the case of Hanson v. Meyer, 6 East. 614. that while any thing remains to be done on the part of the vendor, to the thing purchased, before it can be delivered to the vendee, the property does not pass to the latter; and that not only a mere lien, or special property, but the general property remains in the vendor; but where no further act remains to be done upon the goods on the part of the vendor, it seems that the property vests in the vendee from the time of the sale, subject to the vendor's lien for the price, while they remain in his possession, and the vendor may from that time consider the contract as complete, and bring an action of indebitatus assumpsit for goods bargained and sold. See Dunmore v. Taylor, Peake C. N. P. 41. and cases cited there in notis.

and without payment of the price, and the vendor's only remedy will be by action for the money when it becomes due.(*d*)

A vendor is divested of his lien, by a delivery of the whole of the goods sold to the vendee, or any one who can be considered as his agent for the purpose of receiving them.(*e*) And if that delivery be only symbolical or constructive, as by actual delivery of the key of the vendor's warehouse, in which the goods are deposited at the time of the sale,(*f*) or by actual delivery of a part only of goods sold under an entire contract,(*g*)

(*d*) Y. B. 5 Ed. 4. fol. 2. 17 Ed. 4. fol. 1. Anon. Dyer 29 (b.) Com. Dig. Tit. Agreement. B. 3. and see Hammond v. Anderson, 1 N. R. 69.

(*e*) Godfrey v. Furzo, 3 P. Wms. 185. and cases cited there in note (1).

(*f*) Dict. Ld. Kenyon, Ellis v. Hunt, 3 T. R. 464. Copland v. Stein, 8 T. R. 199.

(*g*) Slubey v. Heyward, 2 H. Bla. 504. Hammonds v. Anderson, 1 N. R. 69. Exparte Gwynne, 12 Ves. jun. 379. In Hammonds v. Anderson, Sir J. Mansfield, C. J. and Rooke, J. seem to rely on the circumstance of the contract's being entire, and of part having been actually taken away by the vendee, and decide the case upon the same ground as that of Slubey v. Heyward. But Heath, J. says "though the goods remained in the warehouse of the defendant after the sale, they were no longer in the possession of the vendor for any other purpose whatsoever." And Chambre, J. ob-

it seems that it would be a sufficient delivery to divest the vendor of his lien upon the whole of the goods.

But if the symbolical or constructive delivery be conditional, and the condition be not performed, the vendor may retain the whole, or whatever part of the goods remains in his possession for the price of the whole. (*h*)

Lien of Wharfinger.

A wharfinger not only has a lien on goods deposited at his wharf for the money due for the wharfage of those particular goods, but is also entitled by the general usage of his trade to retain them for a general balance due from the owner. This was decided in the case of Naylor v. Mangles, 1 Esp. R. 109, where Lord Kenyon, C. J. said, that a lien from usage was a matter of evidence, and the usage in the present case had been proved so often, that

serves that "this is a much stronger case than that of Slubey v. Heyward, which proceeded upon the principle that a delivery of part, where the contract was entire, was a delivery of the whole; but here there was an actual delivery of the whole."

(*h*) Exparte Gwynne, 12 Ves. jun. 379.

he should consider it as a settled point that wharfingers had the lien contended for. And on the authority of this case, the same point was afterwards confirmed and declared to be settled law by Lord Eldon, C. J. in the case of Spears v. Hartley, 3 Esp. R. 81. *(a)*

But wharfingers are not entitled by the common law, nor is there any usage established, which entitles them to a lien upon goods which are not actually landed upon their wharfs, though the vessels in which the goods are, be fastened to the wharfs, and unloaded in that situation. *(b)*

(*a*) And see Savil v. Barchard, 4 Esp. R. 93. Richardson v. Goss, 3 Bos. & Pul. 124.

(*b*) Syeds v. Hay, 4 T. R. 260; and see Stephen v. Coster, 1 Bla. R. 413, 423.

STOPPAGE IN TRANSITU.

CHAP. I.

1. *Nature and Origin of the Right.*
2. *By what Description of Persons, and under what Nature of Contract it may be exercised.*

Nature and Origin of the Right.

THE right, which in the language of the law is designated that of stoppage in transitu, is the right which a person who consigns goods on credit to another, has of resuming the possession of those goods, before they arrive in the hands of the person to whom they are consigned, upon the latter's becoming bankrupt, or insolvent; and of retaining that possession until the full price of the goods is paid. This right is obviously very analogous to the common law right of lien: they are both established upon principles of equity, and the former is in fact only an extension

of the latter, the right of lien enabling the vendor to detain goods sold on credit, before he has relinquished the possession of them, and the right of stoppage in transitu enabling him to resume them before the vendee has acquired possession of them, and to retain them until the full price is paid or tendered; but if that be paid or tendered, he cannot resume, or if he has resumed, any longer retain possession, though the vendee is in insolvent circumstances; for he cannot stop the goods for money due on other accounts,(*a*) and the right of stoppage in transitu does not proceed upon the ground of rescinding the contract any more than the right of lien; (*b*) and hence it appears that the assignees of the bankrupt consignee may recover the goods upon tendering the full price. (*c*) Upon the same principle too

(*a*) So in Snee v. Prescot, 1 Atk. 245, the Chancellor decreed that the factors were only entitled to the purchase money, and charges incident to the goods.

(*b*) And hence the circumstance of the vendee's having paid in part for the goods does not defeat the vendor's right to stop them in transitu, but only diminishes his lien pro tanto on the goods detained. Hodgson v. Loy, 7 T. R. 440; and see opinion of Buller, J. in Lickbarrow v. Mason, 6 East, 25, in notis.

(*c*) Accordingly, in Snee v. Prescot, 1 Atk. 245, the goods were ordered to be delivered up to the assignees,

it has been determined, that although the goods be actually stopt in transitu by the vendor, he may, after the credit for them has expired, recover the price in a count for goods bargained and sold, if he was ready to deliver them upon its being paid. (*d*)

The right of stoppage in transitu though thus similar in its nature to, is, however, of much later origin than that of lien, for the vendor's lien on goods sold for the price is, as we have before seen, an ancient common law right; but the doctrine of stoppage in transitu was first introduced in courts of equity; and the earliest instance to be found of its recognition by those courts is in the case of Wiseman v. Vandeput, 2 Vern. 203, decided in the year

upon payment of the money laid out upon, and the charges incident to them. And in Walker v. Woodbridge, Co. B. L. 394, where the assignees of the consignee got forcible possession of the goods after they had been fairly stopt by the consignor, and he petitioned to have them delivered up to him: the purchase money was ordered to be paid him by the assignees, or the goods to be sold for that purpose; and see judgment of Lord Kenyon, C. J. in Ellis v. Hunt, 3 T. R. 464, where he observes that bankruptcy is no countermand; and see Bohtlingk v. Schneider, 3 Esp. R. 59.

(*d*) Kymer v. Suwercrop, 1 Campb. R. 109.

1690. The benefit which was expected to result to trade from the allowance of the right, (*e*) and the apparent injustice of allowing the goods of the consignor, in the event of the consignee's bankruptcy, to be applied in payment of the other creditors of the latter, induced the courts of law to follow the example of the courts of equity, and to adopt, and by a variety of decisions establish the right of stoppage in transitu as a legal right, (*f*) and upon the same principles of justice, it has since been looked upon both by courts of law and equity as a right to be favoured and encouraged. (*g*) The judges, indeed, of our courts, have frequently expressed their regret that the laws of England were not equally favourable to the vendor of goods in this respect with those of some other countries, and lamented that goods which had been actually delivered after the consignee's bankruptcy, and were distinguish-

(*e*) Bohtlingk v. Inglis, 3 East, 395.

(*f*) Per Buller, J., Ellis v. Hunt, 3 T. R. 469. Hodgson v. Loy, 7 T. R. 440. Per Buller, J. Lickbarrow v. Mason, 6 East, 25, in notis. Dixon v. Baldwin, 5 East, 175. Per Heath, J. Oppenheim v. Russel, 3 Bos. & Pul. 42. In all these cases the right of stopping in transitu is considered as a legal right.

(*g*) Northey v. Field, 2 Esp. R. 613. Scott v. Pettit, 3 Bos. & Pul. 469. Hammond v. Anderson, 1 N. R. 69.

able from the general mass of his effects, should ever have been considered a part of them, and that there should ever have been any necessity for the numerous and nice distinctions which have been made, as to the continuance and determination of the transitus. (*h*)

2. ***By what description of persons, and under what nature of contract the right may be exercised.***

1st. How far necessary that the parties should stand in the relation of vendor and vendee.

Wherever the consignment is made under a contract for sale on credit, and the person who makes it stands in the relation of vendor to the consignee of the goods, he is capable of exercising the right of stoppage in transitu upon them, in the event of the bankruptcy or insolvency of the consignee; nor is the capacity of exercising this right confined to cases in which the contract is expressly for sale, or where the consignor stands in every point of view in the character of vendor; for it extends to every case in which the contract is in effect a sale, and the consignor substantially the vendor of the goods; (*i*) and

(*h*) Snee v. Prescott, 1 Atk. 245. Inglis v. Usherwood, 1 East. 515. Neate v. Ball, 2 East, 117. Scott v. Pettit, 3 Bos. & Pul. 471.

(*i*) Snee v. Prescott, 1 Atk. 245. Walker v. Woodbridge, Cooke B. L. 394. D'Aquila v. Lambert,

therefore where a factor or agent, by the order of his principal, purchases goods for him, and consigns them to him on credit, with an additional charge on account of commission, making himself liable to the original vendor in the first instance, and no privity existing between such vendor and the principal, the factor or agent will be so far considered as the vendor of the goods to the principal, as to be entitled to stop them in transitu, upon the insolvency or bankruptcy of the latter, though he may not, perhaps, be considered as standing in that relation for all purposes. This was decided in the case of Feize v. Wray, 3 East, 93; the facts of which were these: Browne, a trader in London, gave an order to Fritzing, his correspondent at Hamburgh, to purchase and ship for him a quantity of goods. Fritzing accordingly purchased the goods of other merchants, (who were strangers to Browne, and had no correspondence or account with him,) and shipped them on board a general ship,

Ambl. 399. Inglis v. Usherwood, 1 East. 515. Feize v. Wray, 3 East, 93. Bohtlingk v. Inglis, 3 East, 381. In all these cases the consignors were not the original vendors, but purchasers for the consignee; but they were considered, in the language of Lord Henley, as *substantially* vendors to the consignee.

on the account and risk of Browne; the bill of lading was filled up to the order of Browne, and Fritzing drew bills of exchange upon him for the price of the goods and of his own commission for purchasing them, which were accepted, but not paid by Browne, he becoming bankrupt before the arrival of the goods: upon hearing which Fritzing authorized his agent in England to obtain possession of the goods on their arrival, which he accordingly did. An action of trover being afterwards brought by the assignees of Browne against the agent of Fritzing, to recover the value of the goods, it was contended on the part of the plaintiff, that the right of stoppage in transitu did not attach in this case, because Browne must be considered as the principal for whom the goods were originally purchased, and Fritzing no more than his factor or agent, purchasing them on his account; and that the right extended only to the case of vendor and vendee: but Lawrence, J. said, "if that were so, it would nearly put an end to the application of that law in this country; for I believe it happens for the most part that orders come to the merchants here from their correspondents abroad, to purchase and ship merchandize to them: the mer-

chants here, upon the authority of those orders, obtain the goods from those whom they deal with; and they charge a commission to their correspondents abroad, upon the price of the commodity thus obtained. It never was doubted but that the merchant here, if he heard of the failure of his correspondent abroad, might stop the goods in transitu. But at any rate, *this is a case between vendor and vendee; for there was no privity between the original owner of the goods and the bankrupt:* but the property may be considered as having been first purchased by Fritzing, and again sold to Browne at the first price, with the addition of his commission upon it. He then became the vendor as to Browne, and consequently had a right to stop the goods in transitu." The rest of the court agreed with Lawrence, J. that the assignees were not entitled to recover.

No attempt appears to have been made to set up a distinction with respect to the right of stoppage in transitu, in any of the cases where the purchase was made through the intervention of an agent, (excepting the preceding case of Feize v. Wray,) between a case in which the original vendor was named by the principal, and a case where the purchase is

made of an entire stranger to him, and from the language of Grose and Lawrence, Js. in Feize v. Wray, it seems, that if it had been necessary in that case to decide the validity of that distinction, it would have been determined to be without any foundation in law.

A principal who consigns goods to his factor on credit is entitled to stop them before they come into the possession of the latter, upon his becoming bankrupt or insolvent, whether he be considered in the light of a vendor, or not; for if he be considered in that light, he is entitled to exercise the right in common with all vendors; (*e*) and if he be not considered in that light, the property is not divested out of him by the consignment, and even if they were delivered could only be retained by the assignees of the factor upon the ground of lien, or of their being of such a nature as not to be distinguishable from the general mass of the bankrupt's property. (*f*)

(*e*) Wright v. Campbell, 4 Burr. 2047. Kinlock v. Craig, 3 T. R. 119.

(*f*) Godfrey v. Furzo, 3 Peere Wms. 185. Exparte Dumas, 1 Atk. 232. 2 Ves. 582. S. C. A principal may recover his goods in an action of trover, if they remain unsold in the hands of his factor at the time of the

It seems that a person who consigns money to another in advance on any particular account, describing it to be sent for such purpose, is entitled to exercise the right of stoppage in transitu upon it in the event of the consignee's bankruptcy or insolvency; (though the former were indebted to the latter upon the general balance of accounts,) as well as the consignor of goods of any other description; for the consignor of money may be considered in effect as the vendor of it to the consignee, from whom he is to receive an equivalent in return for it; (*g*) but if the money sent were a general remittance, and not described to be made on any particular account, it has been decided that it cannot be stopped. (*h*)

A person who consigns goods to another to be sold on the joint account of himself and the consignee, is likewise so far considered in the light of a Vendor to the consignee, that he may exercise the

latter's bankruptcy, L'Apostre v. Le Plaistrier, 1 Peere Wms. 318. or if they are sold at that time, but not paid for to the factor, and his assignees afterwards receive the money, the principal may recover it from them in an action for money had and received. Scott v. Surman, Willes, 400.

(*g*) Dict. Ld. Kenyon, Smith v. Bowles, 1 Esp. R. 578.

(*h*) Smith v. Bowles, 1 Esp.R. 578.

right of stoppage in transitu in the event of the latter's bankruptcy or insolvency. (*i*)

But the benefit of that right does not extend to cases in which the parties cannot be considered as standing in the relation of vendor and vendee to each other, either actually or substantially; and therefore where there is a contract for the sale of goods immediately between the principal and the vendor, and the factor, or agent is merely a surety for the price, he cannot stop the goods in transitu upon the bankruptcy or insolvency of his principal. This was decided in the case of Siffken and another assignees of Browne, a bankrupt, v. Wray, 6 East, 371. the facts of which were these: Browne, a merchant in London, ordered goods to be shipped to him by Dubois and Co. his correspondents at Dantzic, directing them to draw for the amount on Fritzing at Hamburgh, (who had agreed to accept bills on receiving a commission on the amount,) and to transmit the bills of lading and invoices to Fritzing, who was to forward them to Browne, in London, The goods were accordingly shipped, and Fritzing accepted the bills, and on the receipt of the bills

(*i*) Newsom v. Thornton, 6 East, 17.

of lading, (which were made out to the order of the shippers and not indorsed,) from Dubois and Co. transmitted them to Browne, who received them together with the invoices and letter of advice five days after he had committed an act of bankruptcy. Fritzing's acceptances were afterwards dishonoured, and Dubois and Co. were consequently obliged to retire and take up the bills of exchange. Wray, the agent of Fritzing in London, procured the bills of lading from Browne, upon an undertaking that he would dispose of the goods on their arrival to the best advantage, and apply the proceeds to the discharge of the bills drawn against them, and having afterwards obtained possession of the goods on their arrival, sold them, and paid the proceeds into the court of Chancery, to abide the event of an action directed by that court to be brought by the assignees of Browne against Wray. Dubois and Co. having been apprized of what was done by Wray, wrote a letter signifying their approbation of his conduct, and claiming the proceeds of the goods. The action directed by the court of Chancery having been brought, the court of K. B. were of opinion that the assignees of Browne were entitled to

the proceeds, because Fritzing did not stand in the relation of vendor of the goods to Browne the bankrupt, but was merely a surety for the price, and consequently was not entitled to stop them in transitu; and though Dubois and Co. were the real vendors of the goods, yet Wray could not be considered as their agent, in this transaction, not having received any authority from them until after he had taken possession of the goods; and that even supposing him to have been their agent before, yet there was no *adverse* taking possession of the goods, they having been taken under an amicable agreement with Browne after his bankruptcy.

In conformity to the general rule that none but those who stand in the character of vendors can exercise the right of stoppage in transitu, a person who has merely a lien upon goods, for work done upon them, or trouble or expence incurred about them in the course of his trade, cannot stop them in their transit to the owner, for the satisfaction of his lien. (*k*)

How far necessary that the consignment should be on credit.

Though the consignment of the goods must be on credit, at least for some part of the price, to entitle the consignor to

(*k*) Sweet v. Pym, 1 East, 4. and see Butler v. Woolcot, 2 N. R. 64.

stop them in transitu; yet while any part of it, however small, remains due, he is at liberty to exercise the right, and therefore the circumstance of the vendee having paid in part for the goods, (*l*) or of the vendor's being indebted to him in part of the value, (*m*) will only have the effect of diminishing the vendor's lien pro tanto on the goods, when he has regained the possession of them, and not of

(*l*) Hodgson v. Loy, 7 T. R. 440. Feize v. Wray, 3 East, 93.

(*m*) From the cases of Wiseman v. Vandeput, 2 Vern. 203. Hodgson v. Loy, 7 T. R. 440. and Feize v. Wray, 3 East, 93. it is clear that the vendor's being indebted to the vendee in *part* of the price of the goods consigned will not defeat the right of the former to stop in transitu; but it is not equally clear whether the vendor can exercise that right, where he is indebted to the vendee upon the general balance of account of the amount of the price of the goods. In Wiseman v. Vandeput, the debt due from the vendor to the vendee was ordered to be first paid; and in Hodgson v. Loy, the debt due to the vendee was allowed to be set-off. A distinction, however, was made by Ld. Kenyon, in Smith v. Bowles, 1 Esp. R. 578, between a consignment on a particular account, and a consignment on a general account, the former he thought might be countermanded by the consignor, though he should be indebted to the consignee on the general balance of account to the full value of the consignment, but the latter he decided could not; and see Kinlock v. Craig, 3 T. R. 119.

defeating his right of resuming that possession, before actual delivery to the vendee; and though where the whole price has been *actually* paid by the vendee, the vendor cannot exercise the right of stoppage in transitu upon the bankruptcy or insolvency of the latter; yet the circumstance of the vendee having merely made himself liable to pay the full price, by the acceptance of bills to the amount, and the indorsement of them over to third persons, will not divest the vendor of the benefit of that right: (*n*) and if such bills should be proved under the commission of bankruptcy issued against

(*n*) D'Aquila v. Lambert, Ambl. 399. Lickbarrow v. Mason, 2 T.R. 63. In Kinlock v. Craig, 3 T. R. 119. the consignee who was a factor had accepted bills to the amount of the purchase money, and both were bankrupts: Ashurst, J. in delivering the opinion of the court, said, "It is contended that the consignor has no right to stop the goods in transitu, where the value of them has been paid. I admit the position to be true as between consignor and consignee: but the facts of the case do not admit of the application of it; for they have *not* been paid for, and there is a great difference between payment and a liability to pay. In every instance where the goods are sent in the way of sale, the party to whom they are sent is liable to pay: but till he has paid, in case of his failure, the owner may stop them in transitu. And see Feize v. Wray, 3 East, 93,

the vendee, it will only be considered as a payment as far as the dividend will go. (*o*)

If the consignment be to indemnify or conditional.

If the bill of lading be indorsed, and transmitted by the consignor, under an agreement, and in trust to indemnify against acceptances, he cannot stop the goods in transitu, while the trust and object of the consignment remain unsatisfied, nor will the master of the vessel in which they are conveyed be justified under such circumstances in redelivering them to him; (*p*) and if the delivery is to be made only conditionally, and the consignee offers, and is in a situation to perform the condition, the consignor cannot stop the goods in their transit to the consignee. And where goods are consigned in a ship chartered on the account and at the risk of the consignee, and the bill of lading expresses that the delivery is to order or assigns, *he or they paying freight for the said goods according to the charter party;* the goods cannot be stopped by the consignor upon the consignee's refusing to pay the freight, (that being merely a question between the captain and the consignee,) if the consignee offers to accept bills according to his un-

(*o*) Feize v. Wray, 3 East, 93.

(*p*) Haille v. Smith, 1 Bos. & Pul. 563.

dertaking, and is not in failing circumstances.

But if the bill of lading be conditional, and the condition unperformed, the consignor may under such circumstances exercise the right of stopping the goods during their transit to the consignee. (*q*)

(*q*) Walley v. Montgomery, 3 East, 585.

CHAP. II.

How the Stoppage of the Goods is to be effected.

THE courts both of law and equity, are so strongly inclined to favour and assist the consignor, in regaining the possession of his goods, where he is not paid for them, and the consignee is from bankruptcy or insolvency unable to pay for them, and the goods are still in their transit to the latter, that they will allow the consignor to retake the goods, or to prevent their coming into the hands of the bankrupt, or his assignees, by any means which do not amount to felony, or absolute violence. (*a*) Nor is it necessary in every case, to

(*a*) This doctrine was laid down in Wiseman v. Vandeput, 2 Vern. 203. the first case extant upon the right of stoppage in transitu; and again in Snee v. Prescot, 1 Atk. 245. and recognized by Ld. Kenyon in the subsequent cases of Solomons v. Nissen, 2 T. R. 674. Barnes v. Freeland, 6 T. R. 80. Smith v. Staples, 1 Esp. 578. and by Grose, J. in Feize v. Wray, 3 East. 93. and see Birkett v. Jenkins cited Cowp. 296. A countermand, however, and substitution of a new consignee is most easily effected, where the bill of lading is originally made for delivery to the order of the con-

constitute a stoppage of the goods sufficient in law to prevent them from being distributable under the commission issued against the consignee, that *actual* possession should be taken of the goods by the consignor, by *corporal touch.* Thus in the case of Walker v. Woodbridge, Co. B. L. 494. where the goods were sent by sea, an entry of them, on the part of the consignor, at the Custom House, upon the ship's arrival at the place where they were to be landed, in order to pay the customs for them, was considered a sufficient assertion of his right to constitute a valid stoppage. In the case of Northey and Lewis, assignees of Leyland and Cragg, v. Field, 2 Esp. R. 613. A claim on the part of the consignors was held sufficient. In that case a quantity of wine was consigned to Leyland and Cragg, and after the arrival of the vessel on board of which it had been shipped, but pending the twenty days

signor; because in that case, the consignor may, if he has reason to suspect the failure of the consignee, or is afterwards apprised of it, send another part of the bill of lading to a correspondent at the port of destination, indorsed in blank, or for delivery to him, Abbot 357. But the countermand may also be made on the failure of the consignee, if he is originally named in the body of the bill of lading. See assignees of Burghall v. Howard, 1 Hen. Bla. 365, note (a).

allowed by 26 Geo. 3. c. 5. s. 4. for the payment of the duty, the consignees became bankrupts. After the expiration of the twenty days without payment of the duty, the wine was removed into the king's warehouse pursuant to the same statute, by which it is allowed to remain there three months; during which time the owner may have the wine on paying the duty, warehouse room, &c. but if not paid within the three months, the wine is then to be sold. The day before the expiration of the three months, the agent of the consignors applied for, and endeavoured to obtain possession of the wine, but in vain. The wine was sold by public sale at the expiration of the three months, and the produce which remained after the deduction of the duties, &c. paid into the hands of a broker, against whom the assignees of the consignees brought an action to recover it; and Ld. Kenyon, before whom the cause was tried, was of opinion that they were not entitled to recover, observing that the courts of late years leaned much in favour of the power of the consignor to stop his goods in transitu, and that it was a leaning in furtherance of justice. And though Lord Hardwicke had been of opinion, that in order to stop goods in

transitu, there must be an actual possession of them obtained by the consignor, before they come into the hands of the consignee, that rule had been since relaxed; and it was now held, that an actual possession was not necessary; that a claim was sufficient; and to that rule he subscribed. In the present case, the bankrupt had no title to the actual possession until the duties were paid; until then, they were quasi in custodiâ legis: before the sale the agent for the consignors claimed and endeavoured to get possession; and that was a sufficient stoppage in transitu in his opinion, to secure the rights of the consignor. The doctrine laid down by Lord Kenyon in this case, was afterwards recognized, and adopted by Lord Ellenborough, in that of Nix v. Olive, sit. at Guildhall, Trin. 1805, Abbot 377.

Where the goods continue in the hands of the carrier, or middleman, a demand by the consignor has been repeatedly held to be equivalent in law to an actual stoppage of the goods.(*b*) In the case of Mills v.

(*b*) Snee v. Prescot, 1 Atk. 245. D'Aquila v. Lambert, Ambl. 399. Holst v. Pownal, 1 Esp. R. 240. Bohtlingk v. Inglis, 3 East. 394. Though a claim or demand is a sufficient assertion of his right in the con-

Ball, 2 Bos. & Pul. 457. (*c*) where the goods remained in the hands of a wharfinger, and the consignor, upon information from the consignee that he was insolvent, demanded the goods of the wharfinger as his property, and gave him notice not to deliver them out of his custody: it was determined by the court of C. P. to be as

signor, to constitute a valid stoppage of the goods, possession seems necessary on the part of the consignee, to divest the consignor of his right of stoppage in transitu; for in the case of Northey v. Field, 2 Esp. R. 613, just cited in the text, a prior claim was made on the part of the consignees, which was held ineffectual, though the subsequent claim of the consignor was determined to be sufficient. And in the case of Snee v. Prescott, the first demand on the captain was made by Julian and Le Blanc, the assignees of the consignee, and not by Prescot, the agent of the consignor; and that demand was not noticed, as being of any effect in divesting the vendor's right of stopping in transitu; but the second, made by Prescot, was considered as an effectual exercise of that right; and see judgment of Lord Ellenborough, C. J., Dixon v. Baldwin, 5 East, 175. Stoveld v. Hughes, 14 East, 308; and see post, Chap. III. note (*q*).

(*c*) This, it should be observed, is rather a case in which the contract is rescinded by the mutual consent of the parties, than a case of stoppage in transitu, which must be adverse, and was decided on the ground that the consignee had countermanded his order; see judgment of Lord Alvanley in Scott v. Pettit, 3 Bos. and Pul. 469.

sufficient a stoppage of the goods in effect, as if actual possession had been taken of them by the consignor, and that the wharfinger having upon such demand and notice, undertaken not to deliver the goods, was liable to an action of trover for afterwards delivering them to the assignees of the consignee, contrary to his undertaking. (*d*)

A stoppage of goods either by an agent expressly authorized for that purpose, (*e*)

(*d*) Before the decision of Oppenheim v. Russel, 3 Bos. and Pul. 42, it was doubtful whether a vendor of goods could maintain an action of trover against the carrier, for refusing to deliver them up to him, after notice not to deliver them to the insolvent vendee; see Mills v. Ball, 2 Bos. & Pul. 457. It is clear, however, from the case of Oppenheim v. Russel, that a vendor, who has a right to stop goods in their transit to the vendee, may support an action against a carrier, who after having the money due for the carriage of the goods tendered him, and notice given to him not to deliver them to vendee, refuses, without offering any conditions to deliver them to the vendor. But it seems that if the carrier should, upon reasonable doubt, refuse to deliver up the goods without further authority, or until the circumstances of the case should be ascertained, his conduct would not amount to a conversion, so as to make him liable to an action of trover by the vendor. Dict. Chambre, J. Mills v. Ball, 2 Bos. & Pul. 457, and see post. Chap. IV. note (*r*).

(*e*) In D'Aquila v. Lambert, Ambl. 399, it does not appear whether the agent was expressly authorized or

or by a general agent, not particularly authorized, (if the act of the latter be afterwards recognized and confirmed by his principal,) (*f*) will be as valid as if made by the consignor himself. But a stoppage by a third person, who at the time was not an agent of the consignor, and has received no authority from him for so doing, will not be sufficient, though the act of such person be afterwards adopted, and approved of by the consignor; and to render a resumption by the consignor or his agent, effectual in law, it must be effected with an intention of stopping the goods in transitu, and adversely to the consignee; and if it be made under an amicable agreement with the latter, to sell the goods, and apply the proceeds in discharge of bills drawn by the consignor for the price, it will be wholly invalid against the assignees

not, but his claim was considered sufficient. In Holst v. Pownal, 1 Esp. R. 240, and Mills v. Ball, 2 Bos. & Pul. 457, the goods were claimed by agents particularly authorized. In Lickbarrow v. Mason, 2 T. R. 63, the goods were stopped by an agent authorized for the purpose, and no objection was made on that ground.

(*f*) Feize v. Wray, 3 East, 93, in which case the claim was made by an agent acting under a general power of attorney from the vendor, who afterwards confirmed the act of the agent.

of the bankrupt consignee. These two points were, (as has been already stated) the grounds upon which the case of Siffken v. Wray, 6 East, 371, was decided, the facts of which have been also before detailed.

CHAP. III.

When the Stoppage may be effected.

HAVING shewn by what persons, under what nature of contract, and in what manner the right of stoppage in transitu may be effected, it remains only to explain when it may be effected; and first it is to be observed that this right can only be exercised where the consignee refuses, or is unable, from the situation of his circumstances, to fulfil the conditions of the contract: for the property is vested in the vendee by the contract, subject only to be revested in the vendor under the existence of such circumstances. (*a*) Secondly, as the right of stoppage in transitu can only be exercised while the goods are in transitu, (*) and before they are lawfully aliened by the consignee to a bona fide purchaser, (*b*) the rest of this chapter will be occupied in shewing under what circumstances the transitus may be considered as continuing,

(*a*) Walley v. Montgomery, 3 East, 585; opinion of Buller, J. 6 East, 27, 8, in notis; and see ante, Chap. I. note (*b*) & (*c*).

(*) Coxe v. Harden, 4 East, 211.

(*b*) Post Chap. IV.

or determined, and the detail of the circumstances under which property in transitu may be considered as lawfully and bona fide aliened, will be reserved to the fourth and last chapter.

When the transitus is to be considered as continuing or determined.

The transitus of the goods can only be determined either by *actual* delivery of the goods, or what is equivalent in law to an actual delivery of them, to the vendee or his representative. (*c*) It is therefore to

(c) See judgments of Ashurst and Buller, Js. Ellis v. Hunt, 3 T. R. 464; and of Lawrence, J. delivering the judgment of the court, Bohtlink v. Inglis, 3 East, 381; and of Rooke, J., Oppenheim v. Russel, 3 Bos. & Pul. 42; and see Dixon v. Baldwin, 5 East, 175, and next note. It does not appear that the vendor's right to stop the goods in transitu can be defeated by any other means than by a delivery to the vendee or his representative; in the case of Oppenheim v. Russel. It was argued by counsel that if the goods consigned, previous to their delivery to the consignees, had been seized by the sheriff under a fi. fa. in satisfaction of a debt due from them, the consignors, could not, by virtue of their right to stop in transitu, have reclaimed the goods from the sheriff, unless notice had been given to the sheriff at the time he seized them, of their claim. But Ld. Alvanley expressed great doubt whether the sheriff could make them absolutely the goods of the consignee by stopping them before they came to his hands; and see Richardson v. Goss, 3 Bos. &

be inquired first, what mode of delivery to the vendee, or assumption of possession by him, or his representative, of the goods, is sufficient, or insufficient to determine the transitus; and secondly, at what time that possession may be taken by the vendee, or his representative.

1st. *What mode of delivery to, or assumption of possession by the vendee, or his representative, is sufficient to determine the transitus.*

There may be a sufficient delivery in law to determine the transitus, and divest the vendor of his right of stopping the goods, without their coming to the corporal touch of the vendee, or of his representative. (*d*) The delivery to the vendee

Pul. 119. It has been expressly determined that consignor's right to stop in transitu cannot be divested by the seizure of the goods by a creditor of the consignee under process of foreign attachment, the vendors being the elder and preferable lien. Smith v. Goss, 1 Campb. R. 282. Upon the same principle the carrier's lien for a general balance due from the consignee cannot be brought forward to defeat the consignor's right of stoppage in transitu. Butler v. Woolcot, 2 N. R. 64.

(*d*) In Hunter v. Beal, 3 T. R. 466, Lord Mansfield laid it down that the goods were in transitu until they came to the *corporal touch* of the vendee. But in Ellis v. Hunt, 3 T. R. 464. Ld. Kenyon, J. said, that "this was merely a figurative expression, and had

of the key of the vendor's warehouse in which the goods are deposited, *seems* to be an effectual delivery of them for this purpose. (*f*) And if the goods, after being sold, remain in the vendor's warehouse, and the vendee pay him warehouse rent for them, such payment will be a sufficient ~~cause~~ possession in the vendee, to put an end to the vendor's right of stopping them in transitu. (*g*) And where complete possession

never been literally adhered to." And again, in Wright v. Lawes, 4 Esp. R. 82. the same learned C. J. observed, "I once said that to confer a property on the consignee a corporal touch was necessary: I wish the expression had never been used, as it says too much." And in Dixon v. Baldwin, Ld. Ellenborough observes, "as to Hunter v. Beal, in which it is said that the goods must come to the corporal touch of the vendee, in order to oust the right of stopping in transitu, it is a figurative expression, and rarely, if ever, strictly true;" and see cases ante, note (*a*).

(*f*) In Ellis v. Hunt, 3 T. R. 464, Ld. Kenyon said, "there may be an actual delivery of the goods without the bankrupt's seeing them, as a delivery of the key of the vendor's warehouse to the purchaser; and see Copland v. Stein, 8 T. R. 199.

(*g*) Hurry v. Mangles, 1 Campb. 452. In the subsequent case of Harman v. Anderson, 2 Campb. 243, it was decided that the purchasers having lodged an order (which he had received, together with the invoice from the vendor of the goods) with the wharfinger in whose warehouse they were lying at the time of the sale, to deliver them, and the wharfinger's having

of the goods cannot be taken, from the nature or situation of them, the exercise of such acts of ownership as the circumstances of the case will permit, seems to be sufficient to determine the transitus. Thus in the case of Ellis v. Hunt, 3 T. R. 464, a demand of the goods, and putting a mark upon them by the representative of the vendee, when they had arrived at the end of their journey, was held sufficient to put an end to the transitus. The facts of the case were as follow: Moore, a tradesman in London, ordered a quantity of files from Ellis and Co. manufacturers at Sheffield, and the files were accordingly packed in a cask, and sent by a waggon directed to Moore, in London: while the goods were upon their journey, Moore became a bankrupt, and on their arrival in London, and while they remained at the inn, the goods were attached by Messrs. Fenton and Co. cre-

transferred them in his books into the name of the purchaser, was sufficient to divest the vendor's right of stopping in transitu, and that the wharfinger was after that bound to hold them as the agent of the purchaser. And it was said by Lord Ellenborough, delivering the opinion of the court, that the bare lodgment of the delivery note with the wharfinger, without any transfer in his books, would have been sufficient to produce the same effect.

ditors of the bankrupt, by process of foreign attachment; after which the provisional assignee under Moore's commission demanded the goods of the carrier, and put his mark upon the cask, but did not take the goods away. A few days afterwards Ellis and Co. the vendors, who had previously drawn a bill upon the bankrupt, which was never paid, wrote a letter to the carrier, directing him, in case the goods were not delivered, to keep them in his warehouse, as they had heard that Moore was become a bankrupt. The goods being delivered up to the assignees of Moore when the attachment was withdrawn, an action of trover was brought against them and the carrier by Ellis and Co., and the court decided that the goods were not in transitu at the time when Ellis and Co. the vendors, wrote to countermand the delivery of them. The provisional assignee, who stood in the place of the bankrupt, having, before that was done, put his mark upon the cask, and when the goods were thus marked, they were delivered to the commissioners as far as the circumstances of the case would permit; for being under attachment, the assignee could not then take them away. And even if corporal touch were necessary to defeat the vendor's

right, it took place. And that the bankruptcy of the consignee, which the plaintiff's counsel had argued to be of itself a countermand of the goods, had never been decided to have that effect. (*h*)

It seems that where the goods when sold are lying at a wharf, and the vendor has given an order to the wharfinger to deliver them to the vendee, the mere weighing them by the vendee would be a sufficient assumption of possession to divest the vendor's right of stopping them. (*i*)

A delivery of possession to the vendee or his representative of *part* of the goods sold by an entire contract, will be considered a sufficient delivery to determine the transitus of the *whole*. Thus where a merchant at a foreign port shipped 7061 bushels of wheat by the order, and for

(*h*) That bankruptcy is no countermand, see Scott v. Pettit, 3 Bos. & Pul. 469. Bohtlingk v. Schneider, 3 Esp. R. 58.

(*i*) In Hammond v. Anderson, 1 N. R. 69, Chambre, J. observes: "this was a much stronger case than that of Slubey v. Heyward; that proceeded upon the principle that a delivery of part, where the contract was entire, was a delivery of the whole; *here there was an actual delivery of the whole.* The bankrupt had actual manual possession of every article; *and having weighed them all* took upon himself to separate them. And see ante, note (*g*).

the account of a merchant in this kingdom, to be paid for at a future day, and several bills of lading were accordingly signed by the master of the ship, one of which was immediately transmitted to the consignee, who before the arrival of the ship at the place of destination, sold the goods and indorsed the bill of lading to a third person, and after the arrival of the ship, *and a delivery of* 800 *bushels of the wheat to the agent of the endorsee of the bill of lading;* the consignee became bankrupt without having paid the consignor the price of the goods. The court were of opinion, that the transitus was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of the delivery, to separate part of the cargo from the rest. (*j*) This decision was afterwards confirmed by the same court in the case of Hammond v. Anderson, 1 Bos. & Pul. N. R. 69. (*k*) Where 130 bales of bacon lying at a wharf

(*j*) Slubey v. Heyward, 2 H. Bla. 504.

(*k*) And see exparte Gwynne, 12 Ves. jun. 379. and Hanson v. Meyer, 6 East, 614. and Lord Ellenborough's observations upon this case in Stoveld v. Hughes, 14 East, 308.

having been sold for an *entire* sum, to be paid for by a bill at two months; an order was left by the vendor with the wharfinger to deliver them to the vendee, who went to the wharf and weighed the whole, and took away 25 bales, and then became insolvent; upon hearing which the vendor within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder. And it appeared that by the custom of trade, where the goods sold continued to lie at the wharf after the sale, the charges of warehousing were to be paid by the vendor for fourteen days, at the expiration of which time, and not before, they were to be entered in the books of the wharfinger in the name of the vendee. And it was decided that the contract being entire, and actual possession having been certainly taken of part of the goods, the privilege of stopping in transitu could not attach; Heath, J. observing, that the jury were of opinion that the payment of the warehouse room by the vendor was a mere indulgence given to the vendee; and Chambre, J. that the payment of the warehouse room by the vendor could not make any difference. The vendor, of course, charging just so much more as would pay the ex-

pence of warehouse room: and that if the expence had been paid by the vendee, it would not make a delivery at the wharf a delivery to him; nor could the vendor avail himself of the expences being paid by him to prevent a delivery to the vendee operating as such.

And if a delivery of the *whole* of the goods be once made to the consignee or his representative, the consignor cannot resume possession of them, though the bill of lading was for delivery to the latter, and unindorsed, and the bill of exchange drawn for the price has been dishonoured. (*l*)

Where the consignee uses the warehouse of an agent or other person as his own, and there is no ulterior or more complete delivery to the consignee in view, the transitus of the goods will be considered as determined by the delivery of them at such warehouse. Accordingly in the case of Leeds v. Wright, 3 Bos. & Pul. 320. (*m*) where an agent having a general power, either to send the goods he purchased on to his principal, or to such market as he should consider most bene-

(*l*) Coxe v. Harden, 4 East, 211. 2 Smith's R. 20. S. C.

(*m*) See dict. Chambre, J. Richardson v. Goss, 3 Bos. and Pul. 127.

ficial, ordered them to be sent for him to the house of a packer, and upon their arrival there, went and had some of them unpacked, and sent away, and had the remainder repacked. It was determined that sufficient had been done to put an end to the transitus of the whole of the goods.

The same principle was again recognized by the court of C. P. in the case of Scott v. Pettit, 3 Bos. & Pul. 469. where the goods had been ordered by a merchant in London of Messrs. Wallers of Manchester, and forwarded by them directed to him at the Bull and Mouth Inn, on the 16th of March 1802. On the 23d of March the goods were sent from the Bull and Mouth Inn to the house of a packer, not in consequence of any orders respecting those particular goods, but in consequence of a general order from the consignee, to send all goods directed to him to the packer's house. On the 11th of March the consignee (who lived in lodgings *and had no warehouse of his own*) absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the packer's house they were booked for the account of the consignor, and the packer not knowing that the consignee had then absconded, and not having any directions

from him respecting the goods, caused them to be unpacked with a view to ascertain of what they consisted. On the 31st of March Messrs. Wallers having learned the situation of the consignee's affairs, claimed the goods from the packer, and on the day after they were demanded by the assignees under the commission issued against the consignee, to whom the packer (being indemnified by Messrs. Wallers) refused to deliver the goods: upon which an action of trover being brought against him by the assignees; the court were of opinion that the transitus was at an end by the delivery to the packer; for if the delivery to the packer were not to be considered as the place of delivery to the consignee, in this case, there could be no place of delivery at all, he having no other place of reception for the goods; and it would be a greater hardship upon the creditors in this than in other cases, if they were not permitted to resort to the property in the hands of the packer, as the bankrupt could have no stock in his own possession, and his creditors probably knew that he considered the warehouse of the packer as his own, and that the goods were consigned to him there, and trusted to him upon the credit of those goods,

and the cases in which the transitus of goods in the hands of wharfingers and packers, had not been considered at an end, were cases in which the goods only remained with such persons for the purpose of being forwarded to the consignee.

And if the goods be deposited in a warehouse, which the agent of the consignee has hired for the purpose, and the consignee comes and exercises any act of ownership upon them, the transitus will be sufficiently determined to divest the consignor of his right to stop the goods, though it is intended that they shall be afterwards forwarded from the first place of deposit to the consignee's abode, the ultimate place of their destination. Thus where Wright, a manufacturer at Norwich, agreed with Shevill for the purchase of some pipes of wine, one of which was to be paid for in money, and for the remainder Shevill was to take goods; Shevill wrote to Farquharson, his correspondent in London, to send the wines, who accordingly purchased them of Bamford, Bruin, and Co. and shipped, and by the bill of lading, consigned them to Wright by a vessel employed in the course of trade between Yarmouth and London. On the arrival of the wine at Yarmouth, an

agent for Wright received it on his account, and not having room for them in his own cellars, deposited them in a cellar belonging to Lawes, who was to be paid for the cellar room by Wright. A few days afterwards, Wright arrived at Yarmouth, and tasted the wines and took samples of them, shortly after which Bamford and Co. discovering that Farquharson, to whom they had sold the wine, was a man of no property, stopped the goods in Lawe's possession, giving him an indemnity; Wright having brought an action against Lawes to recover them, it was contended on the part of the latter, that as Wright lived at Norwich the goods must be deemed to be in transitu until they arrived there, the usual course being to put them into lighters, and forward them to Norwich. But Ld. Kenyon said, "There is no colour for saying that these goods were in transitu; all that is necessary is, that the consignee should exercise some act of ownership on the property consigned to him, and he has done so here; he has paid for the warehouse room, he has tasted and taken samples of the wine. But it is said, they have not reached the consignee's place of abode, where they were to be ultimately delivered; but, I think there was

a complete delivery at Yarmouth, they were then delivered to Wright's agent according to the bill of lading, and the responsibility was transferred to Wright."(*n*)

A delivery of goods on board a chartered ship, hired for a term of years, and fitted out, manned, and victualled by the consignee, and over which he has the complete controul, to be sent by him on a mercantile adventure, for which purpose he has purchased them, is a sufficient delivery to put an end to the transitus. (*o*)

And where the goods have so far gotten to the end of their journey, that they wait for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and if without such orders they would continue stationary, the right of stopping in transitu no longer remains in the consignor. This rule was established by the case of Dixon and others, assignees of Battier, v. Baldwin, 5 East, 175. in which it appeared that Messrs. Battier, who were traders living in London, were in the habit of ordering goods of Baldwin, who was a cotton dealer at Manchester,

(*n*) Wright v. Lawes, 4 Esp. R. 82.

(*o*) Fowler v. Kymer, M. T. 38 Geo. 3. cited 3 T. R. 442. 1 East, 522. 3 East, 396.

to be sent to Metcalf and Co. at Hull, for the purpose of being shipped to the correspondents of the Battiers at Hamburgh, and by those correspondents sent to the persons for whom the goods were intended; and on the 31st of March the Battiers sent orders to Baldwin for certain goods to be sent to Metcalf and Co. at Hull, to be shipped for Hamburgh as usual, which were accordingly sent; but soon after Baldwin hearing that the Battiers had become insolvent, stopped the goods in the hands of Metcalf and Co. who had actually shipped four bales of them on board a vessel about to proceed to Hamburgh, but which were returned with the rest to Baldwin upon his giving the Metcalfs an indemnity. One of the Metcalfs who was examined as a witness, stating his business to be merely that of an expeditor agreeable to the directions of the Battiers, *whose orders he was waiting at the time the goods were stopped;* that he had no authority to sell the goods, and frequently shipped them without seeing them. Under these circumstances it was determined that the goods having before their stoppage reached their ultimate place of destination, as between vendor and vendee, and being waiting to receive a new direc-

tion from the latter, the former's right to stop them was consequently divested.

What mode of delivery to, or assumption of possession by, the vendee or his representatives, is not sufficient to determine the transitus.

Though in cases where a complete delivery to, or assumption of possession by the vendee or his agent, is impracticable: the exercise of slight acts of ownership has been held sufficient to determine the transitus of the goods, the same sort of delivery which as between buyer and seller, where there is no inssolvency, would be sufficient to deprive the vendor of his right to take the goods back, would not be so in the case of the consignee's insolvency, or bankruptcy; (*p*) and it seems that a mere demand of them in cases of the latter description, from the person in whose hands they are placed for the purpose of conveyance from the vendor to the purchaser, (*q*) or the payment of the

(*p*) Ellis v. Hunt, 3 T. R. 464.

(*q*) Though a demand only is sufficient on the part of the vendor to effect a stoppage of the goods, it seems that nothing short of possession on the part of the vendee will be sufficient to divest the vendor's right; ante Chap. II. note (*b*). But a symbolical delivery will in some cases be sufficient to produce that effect, ante notes (*c*) (*d*) (*f*).

freight (*r*) on the part of the vendee, would not be a sufficient assumption of possession, to divest the vendor of his right to stop them.

Wherever the party to whom the goods are delivered, for the vendee is merely a vehicle between the vendor and vendee, or wherever the goods are placed in a third person's hands for the purpose of being forwarded to, and a more complete assumption of possession is in contemplation by the consignee, the delivery will not operate as a determination of the transitus. (*s*) Thus, in Stokes v. La Riviere, London sittings after Mich. T. 1784, cited 3 T. R. 466. and more correctly by Lawrence, J. in Bohtlingk v. Inglis, 3 East, 397. the facts of which were as follow: Messrs. Duhem of Lisle, who

(*r*) In Kinlock v. Craig, 3 T. R. 119. The court seemed to think that the payment of part of the freight, if it had not been paid in the quality of factor or with a fraudulent view would have been a sufficient possession. But in Mills v. Ball, 2 Bos. & Pul. 457. where the whole freight was paid by the wharfinger on behalf of the vendee; it was decided that the vendor was not divested of his right of stoppage,

(*s*) Stokes v. La. Riviere, 3T.R. 466. 3 East, 397. Hunter v. Beal, cited 3 T.R. 466. Hodgson v. Loy, 7T.R. 440. Per Ld. Alvanley, Mills v. Ball, 2 Bos. and Pul. 457. Smith v. Goss, 1 Campb. R. 240.

had just arrived in London, applied to Stokes who was a ribbon weaver for a quantity of ribbons, and who having received a favourable account from La Riviere of Duhem's circumstances, packed up goods to a large amount, and delivered them to La Riviere, to be forwarded to Lisle. These goods with others purchased in like manner of Twigge a gauze weaver, were forwarded, on or about the 12th of May, to La Riviere's correspondent at Ostend, with directions to send them to the order of Messrs. Duhem. On the receipt of the goods, viz. on the 29th of May, La Riviere's correspondent at Ostend, wrote to Duhem an acknowledgment and that they waited their directions. On the 12th of June the Duhems stopt payment; and by an instrument signed the 13th of August, consented to Twigge's taking back his goods. But Messrs. Duhem not having fulfilled some engagements with La Riviere, and being considerably indebted to him, La Riviere countermanded the orders he had given to his correspondents at Ostend, as to the delivery of the goods by letter of the 31st of May, and directed them to alter the marks and to deliver them to his order, which was accordingly done; and they were afterwards disposed of in satisfaction

of La Riviere's demand, he contending that immediately upon the delivery of the goods by Stokes to him, the properted vested in Messrs. Duhem, and that he (La Riviere) had a right to retain them. But Lord Mansfield said, " No point is more clear than that if goods are sold, and the price not paid, the seller may stop them in transitu; *I mean in every sort of passage to the hands of the buyers.* There have been an hundred cases of this sort; ships in harbour, carriers, bills have been stopped; in short, where the goods are in transitu, the seller has that proprietory lien. *The goods are in the hands of La Riviere to be conveyed:* the owner may get them back again." This decision, it is to be observed, only determines that the transitus is not at end, while the goods remain in the hands of an agent for the purpose of being forwarded *to the consignee.* But that of Hunter v. Beal, sittings after Trin. 1785, cited 3 T. R. 466, goes a much greater length: in that case the goods had been sent directed for the consignee, to an innkeeper, who gave notice to him of their arrival, the consignor at the same time sending him a bill of parcels, the receipt of which the consignee acknowledged, informing the consignor that the amount was

placed to his credit, and afterwards ordered the innkeeper to send the goods down to a particular quay, to be shipped on board a particular ship to be carried abroad; and the goods were accordingly carried to the quay, but being too late, returned to the innkeeper, who after some days had elapsed asked the consignor what was to be done with the goods, and was ordered by him to keep them until another ship sailed. Under these circumstances it was determined, by the same learned Chief Justice who determined the preceding case, that the goods were still in transitu, in the hands of the innkeeper, and that they must come *to the corporal touch* of the vendee, in order to divest the vendor of his right to stop them. This decision, however, is so directly contrary to the principles of the other decisions upon the same point, and so much shaken, (if not overturned) by the cases of Richardson v. Goss, 3 Bos. & Pul. 119, and of Dixon v. Baldwin, 5 East, 175. (*t*) That though

(*t*) In Dixon v. Baldwin, 5 East, 184, Lord Ellenborough, C. J. says, "in Hunter v. Beal I cannot but consider the transit as having been once completely at an end, in the direct course of the goods to the vendee, that is, when they had arrived at the innkeeper's, and were afterwards under the immediate orders of the

it is not *expressly* overturned, no reliance can be placed upon it, as an authority.

In conformity to the principle laid down in the case of Stokes v. La Riviere, it has been decided, that a delivery of goods from a ship to a wharfinger, to be by him forwarded to the vendee, will not determine their transit, though the wharfinger is appointed by the vendee to receive them. (*u*) And where goods are sent to

vendee, thence actually launched again in a course of conveyance from him in their way to Boston, being in a new direction prescribed and communicated by himself; and if the transit be once at an end, the delivery is complete, and the transitus for this purpose cannot commence de novo, merely because the goods are again sent upon their travels, towards a new and ulterior destination." And Le Blanc, J. observed, with respect to the same case, that the vendee's having given the goods a different direction after they had got to the inn, and before they were stopped, he should have thought that the transit was at an end.

(*u*) Hodgson v. Loy, 7 T. R. 440. Mills v. Ball, 2 Bos. & Pul. 457. Smith v. Goss, 1 Campb. 282. In Hodgson v. Loy the circumstance of the wharfinger's being appointed by the vendee, was considered as being of no importance. But in Mills v. Ball, Lord Alvanley seems to think, that such appointment might make a difference, for he says, "I am of opinion that the wharfinger in this case, *not having been particularly employed by the vendee* is to be considered a middleman. The same circumstance was not considered as making a delivery to the wharfinger, a determination

a packer, for, and by orders of the vendee, the packer will only be considered as a middle-man, and the goods in his hands as being still in their transit, (*v*) provided that in these cases, the vendee do not use the wharfinger's, (*w*) or the packer's (*x*) warehouse as his own, and have an ulterior place of delivery in view.

Upon the same principle, it has been determined, that a delivery of plate to an engraver, to engrave the arms of the purchaser, at the expence of the vendor, will not defeat the latter's right to stop it in transitu, upon the purchaser's becoming insolvent, or bankrupt. (*y*)

So too the delivery of goods to a com-

of the transitus in Smith v. Goss. And from the cases of Snee v. Prescott, 1 Atk. 245. Bowering v. Verullez, cited by Ld. Loughborough in Lickbarrow v. Mason, 1 H. Bla. 364. Hunt v. Ward, cited 3 T. R. 467. Feize v. Wray, 3 East, 93, and Oppenheim v. Russel, 3 Bos. & Pul. 42, and the judgment of Buller, J. Ellis v. Hunt, 3 T. R. 464. that the appointment of the carrier, or middle man, by the vendee, or the goods being conveyed at the risk, and on the account of the vendee, will not render the delivery of them to the carrier or middle man, a conclusion of the transitus.

(*v*) Hunt v. Ward, cited 3 T. R. 467.

(*w*) D. Chambre, J. Richardson v. Goss, 3 Bos. and Pul. 127. Wright v. Lawes, 4 Esp. R. 82.

(*x*) Scott v. Pettit, 3 Bos. and Pul. 469.

(*y*) Owenson v. Morse, 7 T. R. 64.

mon carrier, (*z*) or on board a general ship, (*a*) for the purpose of being conveyed to the vendee, though at the risk and expence, and in the name, and by the appointment of the vendee, (*b*) is not such a delivery as to put an end to the transitus.

The laws of Russia, as well as the civil law, are more favourable than the laws of England, to the vendor of goods, in enabling him to reclaim them, in case of the purchaser's want of ability, or will to pay for them. By one of the mercantile navigation laws of Russia, published the 25th of June, sect. 138, "it is ordered, that if in case of unpaid debts or bankruptcies any body has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose, and therefore loadeth on board of ship, or vessel, goods or cargo; in such case the creditor is to give notice in town, to the head judge of the court, (in districts to the chief,) that the ship or vessel, or goods, or the whole cargo should be retained time

(*z*) Stokes v. La Riviere, cited 3 T. R. 466. Hunter v. Beal, ibid; and see cases, ante note (*s*).

(*a*) Cases cited ante note (*s*), and Bohtlink v. Inglis, 3 East, 397.

(*b*) See note (*a*).

enough until the full payment is made to whom due." "In consequence whereof, and by virtue of this law, if the seller or shipper, in case of bankruptcies can identify that the merchandize belonging to him is in Russia, in ships, warehouses, or wherever they may be, in such case the goods must be given back to the sellers, or shippers, *being their property*, and cannot be brought in concurs," viz. (into the general mass of the bankrupt's effects, to be distributed among his creditors.) The law of England, however, will assist such equitable laws of other countries in their operation upon transactions taking place there, and will allow them to be carried into effect here. Accordingly, where Messrs. Bohtlink and Co. of St. Petersburgh, in pursuance of directions from one Crane, of London, and as factors for him, shipped goods on board a ship *chartered by Crane*, and sent invoices thereof, and a bill of lading of part to him, but learning before the ship's departure, that some bills drawn by them on him, in consequence of a previous transaction, were unpaid, *they procured from the master of the vessel bills of lading to their own order*, and sent them to a friend in London, and informed Crane that he might

have the bills of lading upon giving security to their friend for payment of the bills of exchange to be drawn for the amount of the goods, otherwise, their friend would sell the goods on Crane's account, and apply the proceeds in discharge of the bills of exchange. Crane, in fact, had committed an act of bankruptcy, before any of the goods were shipped. On the arrival of the ship in London, his assignees demanded the goods of the master, and offered to pay the freight, &c. but the master delivered them to the friend of Bohtlink and Co. on their account, in conformity to their indorsement of the bills of lading. Whereupon the assignees of Crane brought an action against the master, and the court held that the law of Russia in this case ought to prevail, though Bohtlink and Co. had not actually taken the goods out of the ship, or instituted legal process for the recovery of them; the master's signature of the bill of lading to their order being equivalent to a stopping in transitu, or re-delivery to them. (*c*) This decision, however, was made merely upon the authority of the Russian law, it having been previously decided by Lord

(*c*) Inglis v. Usherwood, 1 East, 515.

Kenyon at Nisi Prius, * and the same notion being in this case entertained by the court, that the right of stopping in transitu could not be exercised under the law of England, in any case after an unconditional delivery of the goods on board a ship *chartered by the consignee.* But this notion has been since exploded in the case of Bohtlink v. Inglis, 3 East, 381, arising out of the same transaction, in which it was decided, that a delivery of the goods, even on board a ship chartered by the consignee, does not divest the consignor of his right of stopping them in transitu, if the ship is chartered only for the purpose of fetching the goods from the consignor to the consignee, and the consignee has no further controul over it. The facts of the case as applicable to this point were as follow: Crane, the bankrupt, a merchant in London, entered into an agreement with Usherwood, the master of a ship, for that ship to go to *Petersburgh*, and there receive from the factors of the bankrupt a quantity of merchandize of various descriptions, and to proceed from thence to *London*, in consideration of certain freight to be paid per

* Bohtlink v. Schneider, 3 Esp. 58.

ton, half on the unloading, and the remainder in three months; for which goods the master was to sign the usual bills of lading, and Crane was fully to load the ship. In consequence of this agreement the ship sailed to Petersburgh, and was loaded by Bohtlink and Co. on the account and risk of Crane; and one part of the bill of lading, directing the goods to be delivered to Crane, or his assigns, was sent to him; the other part, in consequence of Bohtlink and Co. having information of Crane's insolvency, was afterwards sent to Mr. Schneider their agent, with directions not to deliver that part to Crane, unless he gave sufficient security for the amount of the goods. And Bohtlink and Co. at the same time that they sent this part of the bill of lading to Schneider, informed Crane of their having so done, and required him, in case he did not give the security, to deliver to Schneider the bill of lading that had been sent to him (Crane). In fact, Crane had become a bankrupt before the goods were delivered on board the ship in Russia, but after their purchase; and on the arrival of the ship in the Thames, Schneider demanded the goods of the master, who refused to deliver them to him, but delivered them to the assignees

of Crane. Lawrence, J. after thus stating the facts of the case, in delivering the opinion of the court, said: "for the benefit of trade a rule has been introduced into the common law, enabling the consignor in case of the insolvency of the consignee, to stop the goods consigned before they come into the possession of the consignee, which possession Mr. J. Buller, in Ellis v. Hunt, says, means *actual* possession. That the possession of a carrier is not such possession has been repeatedly determined, and the question now is, whether the possession of the master be any thing more than the possession of a carrier, and not the actual possession of the bankrupt? And to this it appears that Usherwood the master contracted with the bankrupt to proceed from hence to Petersburgh, and to bring in his ship a cargo of goods which Crane engaged should amount to the tonnage of the ship; which does not differ from a similar contract entered into by the consignor by the directions of the consignee at the loading port, for the conveyance of the goods from him to the vendee: in which case it would hardly be contended that a delivery by the consignor to the master of the ship, for the purpose of carriage would be such a delivery to the vendee

as to prevent the right of stoppage in transitu. In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him, and there would be no difference, except that in this case the ship in consequence of the agreement goes from England to fetch the cargo; in the other case the vessel would bring it immediately from the loading port: both in the one case and in the other, the contract is with the master for the carriage of the goods from one place to another, and until the arrival of the goods at their port of destination and delivery to the consignee, *they are in their passage or transit from the consignor to the consignee.* If a man contract with the owner of a general ship to take goods, which are equal to half the tonnage of the ship, and the master complete the loading of his ship with the goods of others, there would be no question but there might be such stoppage: and surely it would not be said that the right of stoppage depends upon the quantity of the goods consigned." The learned judge then observed that the case of Fowler v. Kymer had been relied on in support of the claim of Crane's assignees; and after stating the facts of that case added, that they differed widely from this, in

which Crane had no controul over the ship, and had merely contracted with the master to employ his ship in fetching goods for him; and that the case of Inglis v. Usherwood was perfectly consistent with the decision here given, that case being determined on the ground that the Russian laws authorised the taking of the goods, even if the delivery had been complete.

At what time possession may, or may not be taken by the vendee or his representative.

The vendee may take possession of the goods at any time after they have arrived at the place to which they were consigned by the vendor, though an act of bankruptcy should have been previously committed by the vendee; (*c*) but the vendee cannot deprive the vendor of his right to stop the goods during their transit, by meeting and taking possession of them before they have reached the end of their destined journey. This was decided in the case of Holst v. Pownal, 1 Esp. R. 240. (*d*) in which it appeared that Holst

(*c*) Ellis v. Hunt, 3 T. R. 464.

(*d*) The decision of Wright v. Lawes, 4 Esp. R. 82. is certainly not favourable to, though it does not appear to be entirely irreconcileable with the doctrine laid down in Holst v. Pownal. However, in Mills v. Ball, 2 Bos. & Pul. 461. Lord Alvanley says, in direct op-

who was a merchant living at Leghorn, consigned a cargo of fruit to Dutton and

position to that doctrine, "If in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So though it has been said, that the right of stoppage continues until the goods have arrived at their journey's end, *yet if the vendee meet them upon the road and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage.*" The reporter of this case seems to think that a distinction might be made between goods sent by sea and goods sent by land, as the captain undertakes by the bill of lading to deliver the goods at a particular place. But there does not appear to be any sufficient ground for such a distinction; for the carrier by land seems to be equally bound to deliver the goods at the place to which they are directed, and an action would lie as well against him for a mis-delivery as against the captain of a vessel; and the reason assigned by Ld. Kenyon in Holst v. Pownal, (that if the vendee were allowed to take possession of the goods at any time during the journey, he might entirely defeat the right of stoppage,) applies with the same force to cases of carriage by land, as to those of carriage by water. And in conformity with this opinion of Lord Alvanley, Chambre, J. in his judgment in the case of Oppenheim v. Russell, 3 Bos. & Pul. 42. says "perhaps the consignee himself may intercept the goods in their passage; and indeed I have little doubt but that if he do intercept them in their passage before the consignor has exercised his right of stopping in transitu, and do take an actual delivery from the carrier

Co. at Liverpool, by a ship chartered on their account. The captain signed three bills of lading as usual, one of which was sent to Dutton and Co. Before the ship arrived at Liverpool Dutton and Co. became bankrupts. On ship's arrival at Liverpool, she was ordered to perform quarantine; and during the quarantine, one of the assignees of Dutton and Co. went on board the vessel, claimed the cargo as belonging to Dutton and Co.'s estate, opened some of the chests of oranges, and put two persons on board, who continued there till the quarantine was ended, with a view of keeping possession of the cargo. A few days afterwards, but before the expiration of the quarantine, Holt's agent served a notice of Dutton and Co.'s bankruptcy on the captain of the vessel, and claimed the goods on behalf of Holst. A similar notice was served on the assignees, and when the vessel came into the harbour a claim was again made to the captain, and an indemnity offered to him, by Holst's

before the goods get to the end of their journey, that such a delivery to him will be complete." But the doctrine laid down by Ld. Kenyon in Holst v. Pownal, and which is thus controverted by Ld. Alvanley, C. J. and Chambre, J. appears to be supported by Ashurst, J. in Lickbarrow v. Mason, 2 T. R. 63. and by Lawrence, J. in Bohtlingk v. Inglis, 3 East, 398.

agent; but he delivered the goods to Dutton and Co.'s assignees, against whom Holst having consequently brought an action of trover to recover the goods. They contended, that the principal's right to stop *in transitu* was completely at an end when the consignee had got possession, by any means of the goods consigned: that the consignee might have met the vessel at sea on her voyage, and have taken possession by virtue of the first bill of lading, which possession, they contended, would be complete to divest any right the consignor might have to stop the goods in transitu. But Lord Kenyon was of opinion, that this was a stopping in transitu sufficient to maintain the action; his Lordship said, that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignees, *on the completion of the voyage;* that the case put, that the consignee had a right to go out to sea to meet the ship, could not be supported, as it might go the length of saying, that the consignee might meet the vessel coming out of the port, from whence she had been consigned, and that that would divest the property out of the consignor and vest it in himself; which was

a proposition not to be supported, as there would be then no possibility of any stoppage *in transitu* at all. That in the present case the voyage was not completed, till she had performed quarantine, till which time she was *in transitu;* and as Holst's agent had given notice, and claimed the cargo before the completion of the voyage, he was of opinion, that Holst had stopped the goods time enough to prevent the property from vesting in the assignees.

CHAP. IV.

*When the Consignor's Right to stop the Goods in transitu is divested by the Consignee's having aliened them to a third Person.**

WHERE goods have been consigned under a contract for sale, or what is equivalent to a sale, and the consignor has transmitted to the consignee documents which are sufficient in law to transfer the property, and the consignee has made use of them, to transfer it to a third person, who purchases it *bonâ fide*, for a valuable consideration, and without notice of any circumstances which render the property

* The consignor's right to stop goods in their transit, to the consignee, cannot be defeated by a third person in whose hands they are placed, claiming to retain them on the ground of a lien for a *general balance* due to him from the consignee in the course of trade: accordingly in the case of Oppenheim v. Russel, 3 Bos. and Pul. 42. it was determined, that an usage for a carrier to retain goods for the general balance of account due to him from the consignee, could not prevent the consignor from stopping them, and taking them out of the carrier's hands, upon paying the price of the carriage of those particular goods only.

not fairly assignable, the consignor is divested of his right to stop the goods in transitu, though they were consigned wholly on credit, and the consignee has become insolvent, without paying for them. (*a*)

The only kind of document which has been determined to have the effect of enabling the consignee to transfer the property in the goods consigned to a third person, free from any right of stoppage by the consignor, is that which is termed a bill of lading: (*b*) and different opinions have been held, not only as to the form in which this instrument should be drawn, to constitute a transfer of the property to the consignee; but as to its having in any form, the effect of enabling the consignee to transfer the property to a third person, free from the equitable claims of the consignor. 1st, With respect to the form of the instrument; it was formerly held that the legal property did not pass at all to the consignee by a blank indorsement of the bill of lading; (*c*) but this doctrine

(*a*) Wright v. Campbell, 4 Burr. 2046. Lickbarrow v. Mason, 2 T. R. 63. Salomon v. Nissens, 2 T. R. 674. Cuming v. Brown, 9 East, 506.

(*b*) An invoice seems not to be a sufficient instrument for this purpose, Snee v. Prescot, 1 Atk. 245.

(*c*) Snee v. Prescot, 1 Atk. 245.

has long been exploded, and it is now clearly settled, that an indorsement in blank has the same effect as an indorsement to deliver to the consignee's order, and a bill of lading, indorsed, either in blank, or to the consignee, or order is sufficient to vest the property in him, so far as to enable him to divest the consignor of his right of stoppage in transitu by transferring the property to a third person; (*d*) and if the bill of lading has by its form required and received the indorsement of the consignor, a second indorsement by the consignee is not necessary to complete the transfer of the property from him to a third person. (*e*) Nor is it in every case indispensably necessary in order to give the bill of lading this effect, that there should be an indorsement of it at all by the consignor; for circumstances may exist which are equivalent in law to such an indorsement, and therefore render it unnecessary. Accordingly where a merchant in Ireland sent goods to his factor in London, and wrote to him to insure the goods, and sent him a bill of

(*d*) Lickbarrow v. Mason, 2 T. R. 63. judgment of Buller, J. 6 East, 25. in notis.

(*e*) Lickbarrow v. Mason, 2 T.R. 63. Abbot on Ship. 374.

lading not indorsed, but having the name of the factor on the back; and upon being applied to by the latter for an indorsement, answered by letter that if the bill of lading was not indorsed, it was merely a mistake, and he would send an indorsement, upon which the factor sold the goods; and it afterwards happening that he was unable to pay the bill drawn upon him by the merchant on the general account, a third person paid the bill for the honour of the drawer, and being acquainted with the whole transaction applied to the merchant for an indorsement of the bill of lading, which the latter sent him, and he (having upon the receipt of it demanded the goods of the master, who refused to deliver them to him, but delivered them to the vendee of the factor,) brought an action against the master, which was tried before Lord Kenyon, and his Lordship ruled that the plaintiff had, under those circumstances, no right to take the goods out of the possession of the vendee of the factor; the latter being sufficiently empowered to transfer the property, and having actually done it. (*f*)

The consignor may however restrain

(*f*) Dick v. Lumsden, Peeke's C. N. P. 189.

the negotiability of the bill of lading, by leaving it unindorsed, (*g*) or by confining it by the indorsement to the consignee;(*h*) for if there are no circumstances in the case, which can be considered as equivalent to an indorsement, and the bill be for delivery to order, or assigns, and transmitted unindorsed, the holder of it cannot divest the consignor's right to stop the goods in transitu by aliening them to a third person. Accordingly where one Fox, a wine merchant in London, ordered five pipes of wine of Messrs. Abbot and Co. of Oporto, which they loaded on board a vessel bound to London, and took from the master bills of lading to order, or assigns, one of which they transmitted to Fox in a letter, wherein they said they had shipped the wine on his account, had sent him a bill of lading, and drawn upon him for the price: and Fox accepted the bill of exchange thus drawn upon him; but before it became due the wine arrived; and Fox not being able to pay the duties, it was sent to the king's warehouse under the statute of 26 Geo. 3. c. 59; while it

(*g*) Kinlock v. Craig, 3 T. R. 119.

(*h*) Dict. Ashurst, J. Lickbarrow v. Mason, 2 T. R. 63.

remained there, Fox being indebted to one Mary Nix sold the wine to her for 40l. then paid to him, and the amount of his debt, and soon afterwards became bankrupt, and the agents of the consignors having paid the duties, and obtained the goods, Mrs. Nix brought an action against them for the value. The cause was tried before Lord Ellenborough, and it was insisted, on behalf of the plaintiff, that there was no difference between the indorsement of a bill of lading by the consignor, and the sending it inclosed in a letter of this import. But his lordship declared himself to be of a different opinion, and held that the right of the consignor was not divested under these circumstances.(*i*)

2dly, With respect to the effect of the bill of lading in enabling the consignee to transfer the property to a third person, *bonâ fide*, and for a valuable consideration free from the right of stoppage in transitu by the consignor. It does not appear to have been disputed or denied by any decision, that the consignee of goods on credit might assign his interest in them to

(*i*) Nix v. Olive, sit. at Guildhall, before Ld. Ellenborough, C. J. after T.T. 1805, cited Abbot on Ship. 377.

a third person, by an assignment in proper form of the bill of lading; and the cases of Evans v. Martlett, 1 Ld. Raym. 271, 12 Mod. 156. S. C. Wright v. Campbell, 4 Burr. 2046. 1 Bla. R. 628. S. C. and Caldwell v. Ball, 1 T. R. 205. have placed that point beyond dispute; and it was not until a late period that it became a question, whether the consignee could so far transfer the property in the goods to a third person by an assignment of the bill of lading *bonâ fide*, and for a valuable consideration, as to divest the consignor's right to stop them in transitu. The rule indeed laid down by Lord Mansfield in the case of Wright v. Campbell, that "if the goods are *bonâ fide* sold by the factor at sea, (as they may be where no delivery can be given,) the sale will be good: the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide* and with the owner's own authority," is directly in favour of the affirmative side of this question; but that case was decided on the ground of collusion, and this question was not made the principal point of any decision, until those of Lickbarrow v. Mason, 2 T.R. 63.

and Mason v. Lickbarrow, 1 Hen. Bla. 357. The circumstances of which cases were as follow: *Messrs. Turing and Co.* shipped goods at *Middleburgh* for *Liverpool*, by the order of *Freeman* of *Rotterdam*, and drew bills of exchange for the price, (which were accepted by Freeman,) and took from the master three bills of lading for delivery of the goods to order or assigns, two of which they indorsed in blank, and transmitted them, together with an invoice, to *Freeman* at *Rotterdam*, who sent them and the invoice to the plaintiffs at *Liverpool*, in the same state in which he received them, that they might receive and sell the goods on his account; and drew bills of exchange upon them to nearly the amount, which the plaintiffs accepted; but between the ship's departure and her arrival at Liverpool, *Freeman* became a bankrupt, and absconded, and *Turing and Co.* sent another of the bills of lading to the defendants, indorsed specially for delivery to them; and they thereupon obtained the goods from the master. *Turing and Co.* afterwards paid the bills of exchange drawn by them upon *Freeman*, and the plaintiffs paid those which *Freeman* had drawn upon them. Upon these facts, the court of King's Bench, after

solemn argument upon demurrer to the evidence, decided that by an assignment of the bill of lading by the consignee to a third person, for valuable consideration, and without notice to the assignee that the goods were not paid for, the property was absolutely transferred to the assignee, and that the consignor could not after such an assignment of the goods stop them in transitu, (which he might have done against the original consignee,) because the court considered it a settled principle of law, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it; and the consignor by indorsing the bill of lading to the consignee, by his own act empowered the latter to assign it: a bill of lading directing the delivery of the goods to the consignee, by name, or to the order of the consignor, and indorsed by him in blank, or to a particular consignee, being to be considered as an instrument in its nature transferrable, and similar to a bill of exchange, of which though as between the drawer and the payee, the consideration may be gone into, yet it cannot as between the drawer and an indorsee, because it would be enabling the

original parties to assist in a fraud, and in the same manner, if the delivery of a bill of lading were not in effect a delivery of the goods themselves, as between the consignor and third persons, it would enable the consignee to make the bill of lading an instrument of fraud, and this rule is founded purely on principles of law, and not on the custom of merchants: the custom of merchants only establishing that such an instrument may be indorsed; but the effect of such indorsement being a question of law, which is, that as between the original parties, the consideration may be inquired into, though when third persons are concerned it cannot. And lastly, that the case of Snee v. Prescot, 1 Atk. 245. was determined only upon equitable grounds. This decision was afterwards reversed in the Exchequer Chamber, (*k*) on the ground, that the only effect of the indorsement of a bill of lading, is to give to the holder, or indorsee, a right to receive the goods and to discharge the master of the ship, as having performed his undertaking; that if it were allowed to have any further effect, the possession of the bill of lading, would have a greater

(*k*) Mason v. Lickbarrow, 1 H. Bla. 357.

effect, than the actual possession of the goods themselves; for though the possession of the goods is *primâ facie*, evidence of title, mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. That, as the indorsement of the bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange, which is the assignment of a debt due to the payee, and which by the custom of trade passes the whole interest in the debt, so completely, that the holder of the bill for a valuable consideration without notice, is not affected even by the crime of the person from whom he received it. That bills of lading differ essentially from bills of exchange, in another respect, as the latter can only be used for the specific purpose of extending credit by a speedy transfer of the debt, which one person owes to another, to a third person. But the former may be assigned for as many different purposes as the goods may be delivered, either to the true owner of the goods by the freighter, who acts merely as his servant, or to a factor to sell for the owner, or by the seller of goods to the buyer. That

they are in no certain form, and seldom upon the face of them bear any indication of the purpose of their indorsement, and often express a false account and risk. That to such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange; and that the silence of all authors treating of commercial law, is a strong argument that no general usage that made them negotiable as bills of exchange; and that evidence appears to have been given in other cases, that the received opinion of merchants was against their being so negotiable. That the negotiability of bills and promissory notes, is founded on the custom of merchants and positive law; but as there is neither any positive law, nor any custom of merchants, that can apply to a bill of lading, it is therefore not negotiable as a bill, though assignable, and passes such right, and no better, as the person assigning had in it. That the oldest of our law books consider payment of the price, (day not being given,) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, or sue for them without tender of the price. That in the simplicity of former times, a delivery of actual possession to the vendee

or his servant, was always supposed, but from the variety and extent of dealing which the increase of commerce introduced, a delivery was allowed to be presumed from circumstances by which the property was so far vested in the vendee, as to enable him to assign the goods, and maintain an action against a third person into whose hands they had come; but the title of the vendor still continued until the goods came into the actual possession of the vendee: and hence the vendor had the right of stopping the goods in transitu, which is a right founded on legal as well as equitable principles, and not on a mere personal exception to the consignee, precluding his demand, on the mere ground of its being unconscionable, but extends as well to his assignee for a valuable consideration, and without notice. This judgment was by a second writ of error brought before the House of Lords, when a long and elaborate opinion was delivered by Buller, J. (*l*) in which he adhered to the judgment he had before delivered in the same case in the court of King's Bench, arguing first, from a long series of authorities, that it was clear that by a bill of lading and the legal assign-

(*l*) 6 East, 25, in notis.

ment of it, the absolute property passes to the assignee; and secondly, that the consignor has no right to stop the goods in transitu as against the assignee, that right being founded on equity, though afterwards adopted by courts of law; and what Ld. Hardwicke said in the case of Snee v. Prescott, 1 Atk. 245, with respect to liens, that "where goods have been negotiated and sold again, it would be mischievous that the vendor or factor should have a lien on the price," applying equally to cases of stoppage in transitu, and that doctrine being in fact expressly applied to such cases by the court of King's Bench, in Lempriere v. Pasley, 2 T. R. 485. And the circumstance of the consignor's interest being first provided for in Snee v. Prescott, being founded on what is now admitted to be a mistake in law, in supposing that there was a difference between a full and a blank indorsement, and that the legal property in the latter case remained in the consignor. And lastly, no case having ever arisen in equity, in which a man was suffered to seize goods *in transitu* in opposition to one who has a legal title, and Lord Hardwicke's opinion being clearly against it; and the law, where it adopts the reasoning and principle of a court of equity, never hav-

ing exceeded, and it never being right that it should exceed, the bounds of equity itself. The House of Lords, however, thinking the facts of the case were not laid before them in such a manner as to warrant a decision of the point, directed the cause to be tried again by a jury; and it was accordingly again tried, (*m*) and the jury found a special verdict, stating the same facts as had been given in evidence upon the former trial, and further, "that by the custom of merchants, bills of lading, expressing goods to have been shipped by any persons to be delivered to order or assigns, are, at any time before arrival, negotiable and transferrable by the shipper to any other person, by the shipper's indorsing his name, and delivering or transmitting the same so indorsed to such other person. And that the property is transferred to such other person by such indorsement and delivery, or transmission. And that by the custom of merchants, indorsements of bills of lading in blank, that is, by the shipper, with his name only, may be filled up by the person to whom they are so delivered, or transmitted, with words

(*m*) Lickbarrow v. Mason, 5 T. R. 683.

ordering the delivery to such person. And according to the practice of merchants, the same, when filled up, have the same effect as if they had been done by the shipper, when he indorsed the bill of lading with his name." (*n*) The court of King's Bench, without admitting any farther argument, gave judgment in conformity to their former decision; and in order that the question might be again carried to the other tribunals, another writ of error was brought, but afterwards abandoned, and it is now the admitted doctrine of our courts, that the consignee may, under the circumstances stated in this case, by an assignment or delivery of the bill of lading, confer an absolute right of property upon a third person, indefeasible by any claim on the part of the consignor.

Nor does the circumstance of the consignment of the goods being made to the consignee as a factor, make any difference in his power of transferring the goods, by assignment of the bill of lading, under a contract of *sale*, to a bona fide purchaser, during their transit; because it is a part

(*n*) Evidence to the same effect, was also given in the subsequent case of Haille v. Smith. 1 Bos. & Pul. 53.

of the employment of a factor to sell goods for his principal. (*o*)

But still it is to be observed, that the legal effect of an indorsement, or delivery of a bill of lading, by the consignor to the consignee, is not necessarily, and in every case to give the latter the power of depriving the former of his right of stopping the goods in transitu, by a subsequent indorsement, or delivery of the bill to a third person, even for a valuable consideration, and without collusion, but depends in some measure upon the circumstances of the case, and the relation in which the consignor and consignee stand with regard to each other; (*p*) and accordingly it has

(*o*) Wright v. Campbell, 4 Burr. 2046. Judgment of Buller, J. in Lickbarrow v. Mason, 6 East, 25, in notis.

(*p*) In the case of Coxe v. Harding, 4 East, 211, where a bill of lading was indorsed and transmitted by the consignor to an agent, to enable him to take possession of the goods for the use of the consignor in the event of the consignee's failure; a doubt arose whether the mere indorsement of the bill of lading to the agent without consideration, would enable him to maintain an action of trover for the goods in his own name; but it being determined by the court, that under the circumstances of that case the property vested absolutely in the consignee, so that the consignor himself could not have sued for them, they considered it unne-

been determined, that a factor having only authority to sell and not to pledge the goods of his principal, cannot divest him of his right to stop goods consigned to the factor on credit, during their transit, by indorsing or delivering over the bill of lading, as a pledge to a third person, though the pawnee was not aware of the factor's want of authority to dispose of the property in that way. (*q*)

And where the assignee of the consignee purchases the goods, *with notice of such circumstances as render the bill of lading not fairly and honestly assignable*, he stands in the same situation as the consignee, and the consignor is equally at liberty to exercise the right of stopping in transitu against him, notwithstanding his purchase. (*r*) And if the assignee take the

cessary to decide the point doubted: they, however, at the same time, strongly intimated an opinion, that no property passed by such an indorsement, and consequently that no action of trover could be maintained by the indorsee. And Lord Ellenborough has since decided the same point in Waring v. Coxe, 1 Campb. R. 369, in conformity to that opinion.

(*q*) Newsom v. Thornton, 6 East, 17.

(*r*) Wright v. Campbell, 4 Burr. 2046. Solomons v. Nissen, 2 T. R. 674. Cuming v. Brown, 9 East, 506. If the consignor has given his assent to the transfer, and the assignee has paid the consignee for

assignment of the bill of lading from the consignee, *with notice that they are not paid for, and take upon himself the payment of them, under an agreement that the vendee and himself shall* be jointly interested in the proceeds of them, the assignment will be clearly fraudulent, and therefore will not deprive the vendor of his right to stop the goods in transitu, upon the failure of the consignee without payment. (*s*)

them, it seems the consignor would in that case be divested of his right of stoppage. Where the fairness of the assignment of the bill of lading by the consignee, and consequently the consignor's right to stop the goods in transitu may be questionable, (which must be frequently the case in this country) *it seems* that the law does not impose the burden upon the master of the ship, of determining the question at his own risk, though he may subject himself to it, by entering into an express agreement as to the delivery of the goods intrusted to him. See Fearon v. Bowers, 1 H. Bla. 364, in notis. Caldwell v. Ball, 1 T. R. 205. Mills v. Ball, 2 Bos. & Pul. 457; and see ante Chap. II. note (*s*), and Mr. Abbot's Treatise on Shipping, part 3. c. 9. s. 24, who there states what he conceives to be the proper mode of proceeding for the master to adopt, where the validity of the assignment of the bill of lading appears doubtful.

(*s*) Salomons v. Nissen, 2 T. R. 674. There were two sufficient grounds for the decision which was made in this case. 1. That of fraud between the vendee and the assignee; and 2. Their being partners in the transaction.

The mere circumstance, however, of the assignee of the bill of lading knowing at the time of the assignment of it to him, that the consignor had not been paid *in money* for the cargo, but only by the consignee's acceptances, payable at a day not then arrived, is not of itself, and without the existence of any other circumstances shewing fraud, sufficient evidence of it, to render the assignment defeasible, by the consignor's stopping the cargo in transitu; though if the assignee had been aware at the time of the assignment, that the consignee was unable, from the state of his circumstances, to answer his acceptances, it would have been a sufficient proof of fraud in the former, to invalidate his title against the consignor. (*t*)

And where the vendor of goods for bills payable at a future day, assents to a sale of them by the vendee, to a third person, and allows such person to exercise such acts of ownership upon the goods as amount in effect to a delivery of them, (as marking them with his initials,) the original vendor cannot stop them in transitu, upon the failure of the original vendee without payment of the bills, though the

(*t*) Cuming v. Brown, 9 East, 506.

original vendor was ignorant, until that failure took place, that the second vendee had actually paid for the goods. (*u*)

(*u*) Stoveld v. Hughes, 14 East, 308.

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